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REPORTS OF CASES

HEARD AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

AT GENERAL TERM,

NOT REPORTED IN THE OFFICIAL SERIES,

FROM JUNE, 1889,

WITH NOTES BY

W. H. SILVERNAIL.

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CASES DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK,
AT GENERAL TERM,

NOT REPORTED IN FULL IN THE REGULAR SERIES OF REPORTS, FROM
MARCH 1889, WITH ANNOTATIONS.

CATHERINE A. ANDERSON, Individually and as Executrix,
etc., Respondent, v. WEEKS W. CULVER *et al.*, Appellants.

N. Y. Supreme Court, Second Department, General Term, June 28, 1889.

Mortgage. Payment. Presumption.—The inference of payment of a mortgage arising from the possession of the bond by the mortgagor or his grantee is rebutted by the absence of proof as to whom or when the payment was made or as to any satisfaction piece, or cancellation of record, and by the want of explanation why the old back was detached from, and a new back substituted to, such bond, and why the answer was amended so as to avoid a direct allegation of payment to the mortgagee.

Appeal from a judgment of foreclosure and sale entered on the report of a referee.

Sullivan & Cromwell, for appellants.

Shipman Barlow, Larocque & Choate, for respondent.

BARNARD, P. J.—Weeks W. Culver, one of the defendants, on the 1st of July, 1881, executed a mortgage to the plaintiff to secure a loan to him by the plaintiff of \$6,000. The mortgage was upon lands in Kings county and was recorded 6th of July, 1881. The interest was payable half yearly. On the 31st of July, 1883, Culver sold the lands to the defendants, Thompson & Norris, for \$10,000, and they assumed the payment of the principal sum secured by the mortgage and agreed to pay the same. This deed was recorded on the 2d of August, 1883. The plaintiff commenced

Opinion of the Court, by BARNARD, P. J.

this action to foreclose the mortgage, claiming the entire payment and the interest from July 1, 1886.

Upon the trial, the defendants, Thompson and Norris produced the bond which accompanied the mortgage, and the sole question is whether the presumption of payment arising from its provisions is rebutted by the proof. There were two answers, one put in by Culver and the other by Thompson & Norris. The Culver answer avers payment, and that the mortgage was "fully satisfied and discharged and canceled of record." The Thompson & Norris answer avers that "they paid the plaintiff the whole of the balance money and interest thereon," and that they received a satisfaction piece, which was filed in Kings county on the 10th of April, 1886, which was the day of the payment. The defendants rest entirely upon the production of this bond. No proof is given of the cancellation of the mortgage, and it must be assumed that it is uncanceled of record. The defendants, Thompson & Norris, on the trial, amended their answer by striking out the words in their answer that the payment was made "to the plaintiff." No information is given as to when the payment was made. There is evidently something which Thompson & Norris could make more definite in respect to this payment and which is withheld. The payment presumably was made to the plaintiff under the amended answer. To whom was it made? The bond has been withheld. The back on which would appear the indorsements of interest or of principal, has been detached, and a new back without a mark upon it, substituted. This new back was part of one apparently used by the plaintiff's attorney, for the firm name is written and printed thereon. No explanation is given. Thompson & Norris, or some one for them, can explain where and how this payment was made. Was there a satisfaction-piece, and where is it? Who made the satisfaction certificate?

If the plaintiff executed it, why is the answer altered so as to justify an inference that the payment was made to some

Opinion of the Court, by BARNARD P. J.

one other than the plaintiff? In case she signed it the payment was made to the plaintiff. Thompson & Norris had the power to state the facts, and their omission to do so justifies an inference against their claim. Under the case as it now stands the inference of payment arising from the production of the bond is rebutted, and the judgment should be affirmed, with costs.

DYKMAN, J. concurs.

HENRY L. BUTLER, Appellant, v. THE VILLAGE of EDGEWATER, Respondent.

N. Y. Supreme Court, Second Department, General Term, June 28, 1889.

1. *Municipal corporation. Drainage.*—A village has no right to collect drainage and cast it upon private land, where it has taken no proceedings to obtain a title to do these acts upon such land.
2. *Same. Sewerage.*—It is liable for a defect in the conduit made use of in its system of sewerage.
3. *Same. Natural watercourse.*—Where the bed of a sewer was originally a natural watercourse, a village cannot destroy it by collecting impure drainage and casting the same into it.

Appeal from a judgment granting an injunction.

Wm. M. Mullen, for appellant.

Charles J. Babbitt, for respondent.

BARNARD, P. J.—The plaintiff is the owner of lands in the village of Edgewater. When he purchased in 1869 there was a small natural watercourse upon it. Subsequently the legislature, by chapter 838, Laws of 1869, made a drainage district, which included the plaintiff's premises. The commissioners under this act made a system of works to effect the purpose of the act across the plaintiff's property. The plaintiff's lands were never condemned, but the work

was carried on against his protest. The system was imperfectly made, and in 1878 the pipes burst in worn places and flooded the plaintiff's property with filth. The plaintiff then cleared up the pipes by which this sewerage poured upon his property. The defendants then constructed a cesspool in the avenue opposite the place where the plaintiff had cleared the pipes, and connected this cesspool by a sewer under St. Mary's avenue with another cesspool near New York avenue. A sewer was connected with this cesspool, and it was continued across St. Mary's avenue to the edge of the plaintiff's property where the old watercourse was, and then discharged it on the surface so that the contents were cast on the plaintiff. The village then dug an open ditch to carry the flowings to the New York avenue, near Chestnut avenue, using an old stone conduit built by plaintiff. This conduit was insufficient and has broken in different places, and the sewerage escapes and becomes very offensive and seriously injures the plaintiff's property, and his enjoyment of the same. The village has taken no proceedings to obtain a title to do these acts upon the plaintiff's property. The defendant had no right to collect drainage and cast it upon the plaintiff's land. *Noonan v. City of Albany*, 79 N. Y. 740.

The defendant is liable for a defect in the conduit made use of in its plan of sewerage. *Seifert v. City of Brooklyn*, 101 N. Y. 136.

If the bed of the sewer was a natural watercourse originally, the defendant could not destroy it by collecting impure drainage and casting the same in it.

The case seems to be fully embraced within the principles established in the case of *Chapman v. City of Rochester* (110 N. Y. 273; 18 N. Y. State Rep. 133) as to all the points urged by appellant, and the judgment should, therefore, be affirmed with costs.

PRATT, J., concurs.

RICHARD D. ALLIGER, Respondent, v. THE BROOKLYN
DAILY EAGLE, Appellant.

N. Y. Supreme Court, Second Department, General Term, June 28, 1889.

1. *Libel. Question for the jury.*—Where, in an action against a newspaper for libel, a question of fact arises on the reporter's testimony, as to his credibility, though not contradicted by the testimony of any other witness, and there is a conflict between his story and the presumption of malice which arises from the character of his act, the questions both of malice and damage are properly submitted to the jury.
2. *Verdict. Excessive.*—A verdict, which though quite large, does not shock the average sense of justice, in view of inferences which might be, and doubtless were, drawn by the jury, is not excessive.

This action was brought to recover damages for a libel in publishing that plaintiff, who was in the insurance business, had been arrested for forgery. The publication was taken from the New York Tribune and was followed in a later issue by a retraction.

The plaintiff obtained a verdict for \$4,500.

Appeal from a judgment entered on the verdict.

Morris & Whitehouse, for appellant.

Donohue, Newcombe & Cardozo, for respondent.

PER CURIAM.—Malice was presumed in this case from the conceded falsity and libelous character of defendant's publication concerning plaintiff. The reporter's testimony, that he wrote the article without malice, did not, as matter of law, refute this presumption. A question of fact arose on this reporter's testimony, as to his credibility, although it was not contradicted by the testimony of any other witness, and besides that, there was conflict between his story

Opinion, *PER CURIAM*.

and the presumption of malice which arose from the character of his act. Hence the learned trial judge very properly submitted the questions both of malice and damage to the jury. It was an even question, under the circumstances of this case, whether the first so-called retraction did not make matters worse. When reporters are so industrious in reading up other publications for their employers, they and their employers, too, ought, at least, to be equally industrious in ascertaining whether or not they are true, and in reading up and publishing the corrections made by the original publishers when they are concededly false. The publications in the other papers bore on this point and on the damage which plaintiff had been sustained, showing how far and in what way plaintiff had acquitted of the original charge. The plain truth is that when men engage in a business involving the publication of libelous matter, they must bear the legitimate risks of their business and the consequences of their mistakes. Gross carelessness in publishing such matter, or in making prompt, full and ample retraction, are facts which a jury not only may, but ought to consider in cases of this character. It would be a meagre mitigation for one falsely defrauded in his good name and reputation, to be told that the reporter was very sorry that he had done the wrong; that he had believed the falsehood to be true, and published it to others as true. Displayed libels, conspicuously published, are not very much mitigated by fine type retractions and corrections. A stiff verdict may be pretty severe on the individual newspaper publisher who has to pay it, but, in these days, when newspapers are rendered "spicy" in proportion as their articles are personal, it is not strange that juries should render what may seem severe verdicts. The courts are powerless to prevent this unless the verdict is so large as to indicate passion, prejudice or corruption.

The jury were the proper judges of the damages which plaintiff had suffered. This verdict was pretty large, but

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so was this false charge. The jury probably took that view of the case, and it cannot be said that the verdict shocks the average sense of justice, in view of inferences which might, and doubtless were, drawn by the jurymen.

The judgment should be affirmed, with costs.

GEORGE B. ABBOTT as Administrator, etc., Appellant, v.
MARGARET J. THOMAS, as Executrix, etc., *et al.*, Respondents.

N. Y. Supreme Court, Second Department, General Term, June 28, 1889.

Referee. Case. Certificate.—A referee is warranted in refusing to insert in a case a certificate that a brief abstract contains all the evidence given in support of the findings of fact to which exceptions are taken, where a large mass of testimony was taken on the trial.

Appeal from an order denying a motion to re-settle a case on appeal, and refusing to send it back to the referee for resettlement.

Barnett & Whitney, for appellant.

Dean & Chamberlain (Cephas Brainard, Jr., of counsel), for respondents.

BARNARD, P. J.—Upon the trial of the issue before the referee, a large mass of testimony was taken. The referee made thirty-four findings of fact, and, therefore, dismissed the complaint, with costs. The plaintiff excepted to the fourth finding, which was that George M. Chapin was the agent of Eunice Chapin “in all matters and things referred to in this action.” This exception is applied so far as respects this agency to the fifteenth, nineteenth, twentieth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and the fifth finding. An exception is also taken to the twenty-eighth

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finding. The case as proposed is an abstract of some six folios, The referee refused to insert in it that it contained all the evidence given in support of the findings of fact to which exceptions are taken. The plaintiff's attorney swears that this abstract contains the scope of the case. The defendant's attorney makes an affidavit that the greater part of the evidence to sustain the finding is omitted. The evidence actually given is not presented. It is for the referee to settle the case, and upon this paper the inference is plain that he is right in withholding his official certificate that the case contains all the evidence in support of the findings.

From our knowledge of the trial of cases, it is evident that the abstract should not be deemed to contain all the evidence. The referee did right in refusing to exercise so dangerous a power as to determine that the brief abstract represented all the evidence on the trial in support of the findings in question.

Order affirmed, with costs and disbursements, and motion denied, with ten dollars costs.

All concur.

JOHN M. ANDERSON, Respondent, v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellants.

N. Y. Supreme Court, Second Department, General Term, June 28, 1889.

Verdict. *Conflict of evidence.*—An appellate court, whatever the influence which controlled the jury may be, cannot set aside their verdict, where any of the material facts are strongly litigated, though the appellant has the preponderance of witnesses.

Appeal from a judgment entered on a verdict, and from an order denying a motion for a new trial.

Tracy, MacFarland, Boardman & Platt, for appellant.

Samuel Keeler (C. S. Rust, of counsel), for respondent.

BARNARD, P. J.—The plaintiff, on the 6th of January, 1888, was driving a coal wagon at Union Hill, N. J. This place is in Weehawken, and the defendant operates its railroad through the place, crossing William street nearly at right angles. The wagon of the plaintiff was loaded with coal, and the accident occurred between eight and nine o'clock in the morning. There were gates at the crossing and these gates were up. It was a matter of dispute whether the flagman was there, and the jury have found that he was not. The plaintiff slowly approached the crossing in the rear of a brewer's truck. He stopped and listened when he got near the track; he heard nothing and saw nothing. There was a train of cars standing on the track. These cars were very high. The cars obstructed the view until the plaintiff reached the second track, which was that of the defendant, and then just as his horse's fore feet got upon the track an engine attached to a heavy train struck the horse and threw out the plaintiff from the wagon. He

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was injured by the fall. The principal question litigated was one of fact, whether or not the signals were given before arriving at the crossing. The plaintiff says they were not. He is supported by the witness, Mohrinhagen, who was tending a coal wagon near by. He says there was no bell ringing, and that the flagman only came out after the brewery wagon driver sounded an exclamation of alarm. The driver of the brewery wagon, Schell, is still more explicit. He testifies that there was no signal given by the people in the engine, "nothing, no steam, no bell ringing, nothing at all." He also says there was no flagman at the crossing. He barely escaped accident by whipping up his four horses. The defendant gives evidence tending to show that the bell was ringing before the crossing was reached. One witness, Mervin, who so testifies, did not see any beer wagon, and he was on the cab looking out. The engineer, brakeman and flagman testify that the bell was rung, but neither saw or heard of the brewery wagon in front of the plaintiff. Ruby and Rirz, two employees of the defendant, also testify to the ringing of the bell. In number the defendant had a preponderance of witness. The plaintiff's witnesses were believed by the jury. The instruction, care and caution in the presence of danger probably had an influence with the jury. It is not likely or reasonable that a person would approach a dangerous place in the presence of the warning signals of the danger. Whatever the influence which controlled the jury, an appellate court cannot set aside a verdict when the fact of the signals being given and material surrounding facts are so strongly litigated.

All concur.

IRENE PINTO DE CARRILLO, Respondent, v. ENRIQUE CARRILLO, Appellant.

N. Y. Supreme Court, First Department, General Term, July, 6, 1889.

Pleading. More definite and certain.—By rule 22 of the general rules of practice, a motion to make a complaint more definite and certain is required to be made before the service of a demurrer or an answer.

Appeal from an order denying a motion to make the complaint more definite and certain.

Emmet H. Olcott and William Q. Judge, for appellant.

William Nelson Cromwell and Merritt E. Haviland, for respondent.

DANIELS, J.—The answer of the defendant in this action was served on the 17th of November, 1888, and the notice of motion to make the complaint more definite and certain was not given until the latter part of January, 1889. This entitled the plaintiff to a denial of the motion, for, by rule 22 of the general rules of practice, a motion of this description is required to be made before the service of a demurrer or an answer. The order, accordingly, should be affirmed, with ten dollars costs and also the disbursements.

VAN BRUNT, Ch. J., and BARRETT, J., concur.

AUGUSTA A. CURRIER, Respondent, v. THE OGDENSBURGH
AND LAKE CHAMPLAIN RAILROAD COMPANY, Appellant.*N. Y. Supreme Court, Third Department, General Term, July 6, 1889.*

1. *Railroad. Duty.*—A railroad company which locates its road upon the public highway, is legally bound, not only to construct the same in such manner as to render it reasonably safe for the travelling public, but also to maintain it in that condition
2. *Jury. Determination final.*—When a fair question of fact, upon conflicting evidence, is presented for the consideration of the jury, and their determination is supported by the facts and circumstances of the case, the general term will not interfere with their finding.

Appeal from a judgment entered upon a verdict, and from orders denying a motion for a new trial upon the merits, and for newly discovered evidence.

Louis Hasbrouck, for appellant.

Albert Hobbs, for respondent.

INGALLS, J.—This action was brought by the plaintiff to recover damages for an injury which she claims to have received in consequence of being thrown from a sleigh in which she was riding, with her husband, who was driving the horse. The plaintiff insists that the evidence justified the jury in finding that the sleigh was overturned, and that she was thrown to the ground and injured in consequence of the negligence of the defendant, in omitting to keep in safe condition its track where it crosses the public highway, known as Elm street, in the village of Malone. That such omission of duty on the part of the defendant consisted in its allowing the planking next to the rails

where they crossed said street, to be removed, thereby exposing such rails to the height of from four to five inches above the ties, which created a dangerous obstruction to travel upon the highway, and which caused the sleigh in which the plaintiff was riding to be overturned.

While the evidence in regard to the removal of the planks, and the condition of the track at the time of the casualty, was conflicting, yet we are satisfied that the jury were justified in finding as they did upon that question. Witnesses on the part of the plaintiff testified at the trial that the planks had been removed, based upon their observation and inspection, at the time of the accident, and also before it occurred. To overcome such evidence, the defendant relied upon the testimony of its employees, who respectively spoke, with greater or less certainty, in regard to the subject. We are convinced that a fair question of fact was presented for the consideration of the jury, and that their determination is supported by the facts and circumstances of the case to such an extent that this court should not interfere with their finding. The question of contributory negligence was, we think, properly decided by the jury. It was submitted by the trial court as a question of fact to be determined by the jury, and in such form as to render the plaintiff chargeable with even the negligence of her husband in the management of the horse, if the jury should determine that any such existed and contributed to the injury, which was certainly most favorable to the case of the defendant. The defendant having located its road upon the public highway, was legally bound not only to construct the same in such manner as to render it reasonably safe for the travelling public, but was also obligated to maintain the same in that condition. Such obligation was voluntarily assumed by the defendant for its benefit, and it should faithfully discharge the duty imposed by law. *Worster v. Forty-second Street R. R. Co.*, 50 N. Y. 203. The doctrine upon this subject is defined in the

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opinion pronounced, in the case referred to, by Chief Justice CHURCH, in the clear and concise manner so characteristic of the opinion of the learned judge. We have carefully examined the affidavits upon the motion for a new trial, upon the ground of newly discovered evidence, and we find no reason to differ with the conclusion of the learned justice who decided the motion.

He tried the cause, and became thereby presumably familiar with all the features thereof, and consequently was enabled with facility to understand and determine the force and probable effect of the evidence sought to be put into the case of the defendant upon another trial, if it should be granted. We are not able to resist the impression acquired by an examination of the case, that such motion was rather experimental, and lacking in the merit, which should exist to recommend such a motion to the favorable consideration of the court. We are satisfied that no sufficient ground has been established by the defendant which calls for a reversal of the judgment, or for a new trial, upon the ground of newly discovered evidence. The judgment must be affirmed, and new trial denied, with costs.

LEARNED, P. J., and LANDON., concur.

CROWN POINT IRON COMPANY, Respondent, v. THE ÆTNA
INSURANCE COMPANY, Appellant,

N. Y. Supreme Court, Third Department, General Term, July 6, 1889.

1. *Insurance. Cancellation of policy.*—Where the insured, through his agent, forwards his policy to the agent of the company, with the direct request that it be cancelled, and a suggestion that it be allowed a *pro rata* rebate of premium, the cancellation is effected, though the company has not accepted the policy nor repaid the premium.
2. *Same. When effected.*—The mailing of the policy by plaintiff's agent to the agent of the company for the purpose of cancellation, was a surrender of the policy, even though it did not reach such agent until after the destruction of the property by a fire.
3. *Same. Return of policy after fire.*—The return of the policy by the company's agent after the fire even with knowledge of its occurrence, did not give it vitality, nor create any liability for such previous loss.

Action brought to recover upon a policy of insurance. The defendant claimed that the policy had been surrendered and canceled.

The general manager, and assistant general manager of plaintiff, on July 25, 1866, examined the insured property and decided to reduce the insurance, and on July 28, the assistant sent the policy to the agent of the insurance company for cancellation. The insurance agent received the policy on July 29, and on that day the insured property was destroyed by fire. The next morning the insurance agent, with knowledge of the fire, returned the policy to plaintiff's agent.

Plaintiff recovered a judgment and from it defendant appeals.

A. H. Sawyer, for appellant.

R. L. Hand and Waldo & McLaughlin, for respondent.

LEARNED, P. J.—It is evident that the examination by Inman and Reed satisfied them that the plaintiff had more insurance than was needed on the charcoal, and made Inman decide to reduce it largely or to give it up altogether. The total amount was \$14,000, and there is some indication that about \$3,000 was considered to be sufficient. Certainly Inman testifies that they had to cancel some, and would cancel all, if they could do so on a full *pro rata* return. We cannot see then why Reed's act was not fully authorized, even without reference to such authority as he may have to act himself.

He did not return all the policies. There were twelve and he returned nine. Inman does not state that he gave any direction how many should be canceled. It must, therefore, had been left to Reed's judgment, who with Inman had examined the amount of charcoal remaining. And there is nothing in Inman's testimony which indicates that if a part only of the policies were to be cancelled, this must be done on a full *pro rata* return. In saying this we do not mean to imply that Reed's act would not have been binding on the plaintiff, even if he had returned all the policies in his letter to Page. He had been held out to the world as assistant general manager. He had procured policies for the plaintiff. He had general charge of business in the absence of Inman. And, though it may have been in the power of Inman to direct Reed as to what insurance to procure, yet the evidence shows that the business as to the insurance companies was done by Reed.

Taking then Reed's acts as the acts of the plaintiff in this respect, we come to his letter to Page: "I send you insurance polices on charcoal for cancellation. Our stock is nearly used up." Here we have a direct request that the policies be cancelled, with the reason therefor, viz., that the plaintiff had not as much property, as the insurance. They,

therefore, wished to save something of the premium which they had paid. This was then a request for something which would benefit plaintiff. The next sentence is not a condition of the surrender; but is an asking for good terms. "We should be allowed for the unexpired time *pro rata* on amount paid." That is the plaintiff thinks it should be allowed *pro rata*. It appears that no cancelling policies there is sometimes allowed, a "short rate," and sometimes "a ratable proportion." By the condition in defendant's policy, when the insurance is terminated at the request of the insured the company retains short rates for the time the policy has been in force, when by the company, it refunds ratably.

The meaning seems to be that if the insured terminates the policy he pays for the time he has been insured, at the rate usual for that short time. The plaintiff only desired to pay only *pro rata*. Still that was not made a condition of the surrender. That had been acted upon by Reed in sending the policies.

Aside from the condition in these policies, it is provided by section 3, chapter 110, Laws 1880, that any insurance company shall, at the request of the insured, cancel any policy, "and shall return to said party, or his legal representatives, the amount of premium paid, less the customary short-rate premium for the expired time." Therefore, on thus surrendering the policies, with the request for cancellation, the plaintiff, if payment was refused, would have a right of action for the premium paid, less the short rate for expired time. The plaintiff hoped that the defendant would do better than this, but the surrender of the Ætna policy was complete. Nothing remained to be done by plaintiff. The defendant owed the plaintiff the amount provided by statute, and might voluntarily pay more, but whether the defendant paid that or not, the plaintiff had done in respect to the Ætna Company all that was needed. It had given up its policy to a person authorized to cancel, and had re-

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quested cancellation. The policy was no longer in plaintiff's possession. *Train v. Holland Purch. Ins. Co.*, 62 N. Y. 508.

The plaintiff urges that, in order to effect a cancellation, the insurance company must accept the policy and, perhaps, must repay the premium. But this cannot be so. The plaintiff had paid the premium. In consideration of that payment the defendant had agreed to insure plaintiff for a certain time. Can it be that plaintiff could not, by some means or other, give up and surrender the benefit it had thus paid for? Suppose, after a person had obtained his policy, he should be satisfied that the company was insolvent, could he not give up or release this policy, so as to be able to procure one from a solvent company? Or could the company, by refusing to accept his surrender, prevent his obtaining better insurance? Certainly not. Whether the company, without some condition in the policy or some statute, would be obliged to return anything, is a different question.

The plaintiff cites cases in which it has been held that if an insurance company would cancel a policy, they must not only give notice, but must return the premium or some proper part. *Griffey v. N. Y. Central Insurance Company*, 100 N. Y. 417. But the position of the company is very different. It had bound itself to do certain acts for the insured, and has received the consideration. It can relieve itself from the liability only by actually refunding the amount provided for, and not by promising to do so. If it desires to take away something from the insured, it must perform the condition; but the insured, may give up what he possesses, even if the insurance company never pays back what it owes him therefor.

We think, then that the plaintiff had actually surrendered the Ætna policy on its receipt by Page, who had authority to cancel. Hence, no subsequent re-delivery by Page to Reed after the fire, and with knowledge of the fire,

could make the policy valid. Such re-delivery was a wrongful and fraudulent act towards the defendant. They could have hardly thought that it would change the rights of the plaintiff and the defendant, unless by its cancelling what had been actually done. There was no liability of the defendant on the policy at the time of the fire except to return the proper part of the premium, and there can be no recovery in this action against the Ætna Company.

The fact as to the other companies are similar. Whether we regard Page as the agent of plaintiff to send the policies to Little, or as Little's agent to receive them, does not seem to be very material. They were on their way in regular course of transmission by the plaintiff's order. The referee does not find whether they reached Little at nine o'clock on the evening of the 29th, or on the morning of the 30th. At any rate, between 9 and 10 A. M. of the 30th, Little received the package and read the letter, and laid it aside to be answered. We think that the language of Page's letter requesting a high rebate is not a condition of the surrender. The surrender was absolute. Page, considered as plaintiff's agent (the most favorable view for plaintiff), mailed, by plaintiff's request, the package the afternoon of July 29th, and before the fire.

By that act plaintiff parted with the control of the policies and did so for the purpose of obtaining its cancellation. That act was plaintiff's surrender of the policies; because it was the decisive act which put the policies intentionally out of plaintiff's possession. And even though they did not reach Little until after the fire, the surrender had taken effect before. *Atlantic Insurance Company v. Goodhall*, 35 N. H. 328. The plaintiff had decided that it wished these policies cancelled, and it at once did all it reasonably could to effect that result. It had the right to treat its act as a surrender of the policies; and so had the insurance companies.

If this be so, then clearly the return of these policies by

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Little to Page could not give them vitality. A fraud was practiced upon Little, and on the companies, through him, by asking the return of the policies and concealing the fact of the fire. The property which they were intended to insure had already been destroyed or partially destroyed. Even a new policy issued in ignorance of that fact would have been invalid; and in any case could have created no liability for such previous loss.

The judgment in favor of the plaintiff in the above-entitled action, and the similar judgments in the five other actions against other companies are reversed, new trials granted, referee discharged, costs to abide event.

LONDON and INGALLS, JJ., concur.

JAMES COOK, Respondent, v. VILLAGE of WATERFORD
Appellant.

N. Y. Supreme Court, Third Department, General Term, July 6, 1889.

1. *Amendment. On appeal from justice's court.*—The pleadings, in causes which arise in justice's court, and are appealed to the county court for a new trial, should not be changed in the latter court, unless it is made very clearly to appear from the moving papers that the attainment of substantial justice requires such amendment.
2. *Same. When not granted.*—The party seeking the amendment in such case, is called upon to inform the county court of all the facts, which are necessary to enable that court to determine that substantial justice will be promoted by allowing such amendment, and if he fails to do so, he is not entitled to the relief sought.

Appeal from a county court order denying a motion to amend the answer.

T. O'Conner, for appellant.

C. E. Keach, for respondent.

INGALLS, J.—We are convinced that the decision denying the motion was right, even though the reason assigned therefor should be regarded of doubtful soundness. The cause had been tried in the justice's court upon the pleadings then interposed by the plaintiff for \$150 damages, for an injury to his horse from a fall on the public highway of the defendant, which was, for want of repairs, in an unsafe condition, in consequence of which the horse fell. The cause was appealed to the county court, and a new trial was demanded in that court. The defendant made a motion in that court, at a special term thereof, for leave to amend the answer by setting up a new defense, viz., want of funds in its treasury applicable to repairs upon the highways. It is quite evident that the county court was not required to allow such amendment unless satisfied that substantial justice would be promoted thereby.

The papers upon which the motion was made do not show that the repairs which were necessary to put the highway, where the injury to plaintiff's horse occurred, in a safe condition, required the expenditure of any money whatever. It appears only by the complaint that the horse of the plaintiff while traveling upon such highway, "sunk and fell there." The papers do not show the magnitude or nature of the defect which caused the injury, and if we are to indulge in inferences in regard thereto, we may infer that a slight repair, requiring the use of a little gravel, applied with shovel and hoe, was all that was required to repair the defect, and prevent the injury; which could obviously have been accomplished without the expenditure of any money. The party seeking the amendment was called upon to inform the county court of all the facts, which were necessary to enable that court, to determine that substantial justice would be promoted by allowing such amendment, which the defendant failed to do, and consequently was not entitled to the relief sought. Again, in causes which arise in justice's court, and are appealed to the county court, where a new

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trial is demanded, the pleadings should not be changed in the appellate court, unless it is made very clearly to appear that the attainment of substantial justice requires such amendment, as the successful party in the justice's court, might be subjected to expense and loss in consequence of the change of the issues in the appellate court. We conclude that as the defendant failed to make a case, which called for the amendment sought, the county court administered substantial justice by denying the motion. The order should be affirmed, with costs and disbursements.

LEARNED, P. J., and LANDON, J., concur.

POLLY BOGERT, v. DANIEL J. BOGERT, *et al.*

N. Y. Supreme Court, Third Department, General Term, July 9, 1889.

Partition.—A deed from an interested person, not a party, to a party in a partition suit, after the rendition of the decree therein, will not pass such interest to the purchaser at the partition sale.

Motion for re-argument.

P. Q. Eckerson, for appellants.

G. W. Pleasants, for respondent.

PER CURIAM.—There is nothing in the moving papers on which the order appealed from was granted to show that the deed from Moyer to Bogert was tendered to the purchaser, and the purchaser denies the fact of the tender or production of that deed. We, must, therefore, dispose of the appeal upon the record presented to us.

But if we should take notice of the deed, it would not cure the defect in the title. Bogert, the grantee, was a party to the action. But the only interest in the premises in suit adjudged him by the decree, was his courtesy as

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husband of the plaintiff. If he had had at the time of the decree any other interest, probably the decree would have concluded him. But the conveyance to Bogert from Moyer, was not made till five months after the decree. The effect of such conveyance is simply to vest in Bogert the interest formerly held by Moyer. That interest is still outstanding, and would not pass to the purchaser at the partition sale. The conveyance therefore is nowise effective to cure the defect in the title. Motion for re-argument should be denied with costs.

STEPHEN L. BARTLETT, Respondent, v. EDWARD SUTORIUS, Appellant.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

Arrest. Agent. Section 549.—The complaint, in order to justify an arrest in an action against an agent, must contain a specific allegation that the money or property, for the misappropriation of which the action is brought, was received by such agent in a fiduciary capacity.

See Note at the end of this case.

Appeal from judgment entered on verdict directed by the court.

Austen G. Fox and Chas. Stewart and Davison, for appellant.

Daniel D. Sherman, for respondent.

VAN BRUNT, P. J.—The only question necessary to consider upon this appeal is whether the complaint states facts sufficient to show that the defendant was liable to an order of arrest.

The allegation of the complaint is that the plaintiff shipped certain goods consigned to the defendant, then his agent in New York, to sell for cash or on thirty days' credit;

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that the defendant received said goods on account of plaintiff, and thereafter sold the same, with the exception of a small amount, and that the defendant has collected the proceeds of such sale, and has neglected, and still neglects, and refuses to render to the plaintiff a just and true account of such sales, and has also neglected and refused to pay over the proceeds to the plaintiff, with the exception of a small amount, and has wrongfully converted the same to his own use.

Section 549 of the Code provides that a defendant may be arrested in an action where the action is brought to recover for money received, or to recover damages for the conversion or misappropriation of property, where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer, attorney, solicitor or counsel, or an officer or agent of a corporation, or banking association, in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity, where, on such allegation, the plaintiff cannot recover unless he proves the same on the trial of the action, and a judgment for the defendant is not a bar to a new action to recover the money or chattel.

It is clear, for the reasons stated in the case of *Hollis v. Bleckert*, herewith decided, that the complaint to justify an arrest in an action against the agent, must contain a specific allegation that the money or property, for the misapplication of which the action is brought, was received by such agent in a fiduciary capacity. The complaint in this case containing no such allegation, the motion for judgment upon the pleadings in favor of the defendants should have been granted.

The judgment must be reversed and a new trial ordered, with costs to appellant to abide event.

BARTLETT and BRADY, JJ., concur.

Note on Arrest for Misapplication of Property.

NOTE ON ARREST FOR MISAPPLICATION OF PROPERTY RECEIVED IN A
FIDUCIARY CAPACITY.

Before the amendment of 1886 to subdivision 2 of section 549 of the Code, the facts, upon which the right to an arrest depended in an action to recover money received, or property misapplied, by a person acting in a fiduciary capacity, were to be proved by affidavits or other extrinsic evidence, upon which the order of arrest was granted, and issues thereupon arose upon the defendant's counter-affidavits, and were determined upon his application to vacate the order of arrest. But the effect of this amendment is to require the matters of fact, upon which the right to arrest depends in this case, to be alleged in the complaint, and to be made the subject of issues and proof in the action. Where the plaintiff makes such an allegation in his complaint, in order to lay the foundation for an order of arrest, he is obliged to prove the averment on the trial, in order to recover. But if he fails to establish the allegation on the trial, and thereby suffers a defeat in the action, the judgment for the defendant is not a bar to a new action to recover the money or chattel.

Section 549 of the Code as amended by chap. 672 of the Laws of 1886, in respect to the point under consideration, reads as follows:

Section 549. A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes:

2. ———or to recover for money received, or to recover property or damages for the conversion or misapplication of property, where it is alleged in the complaint that the money was received, or the property was embezzled or fraudulently misapplied, by a public officer or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity.

Prior to this amendment, the allegation as to the receipt of the money by the agent in a fiduciary capacity was not required, and, therefore, decisions prior thereto are of no value in the discussion of the question. *Hillis v. Bleckert*, 53 Hun. 499.

The plaintiff must, when he invokes the remedy of arrest on the ground that the defendant has, while in his employment, received his money in a fiduciary character, and improperly converted it to his own use, tender an issue on that subject by proper allegation in the complaint and prove it on the trial. *Hillis v. Bleckert*, 53, *ante*. A statement of facts and circumstances which might justify the legal conclusion of money received in a fiduciary capacity does not comply with section 549 of the Code, inasmuch as this section requires such an allegation to be made in the complaint, and de-

 Note on Arrest for Misapplication of Property.

clares that the plaintiff cannot recover unless he proves the same on the trial. *Id.* In this case, there was no allegation that the money mentioned was received by the defendant in a fiduciary capacity, and the complaint was therefore held to be deficient in an essential element. And in the case of *Bartlett v. Sartorius*, above reported, it was held that, to justify an arrest in an action against an agent, the complaint must contain a specific allegation that the money or property, for the misapplication of which the action is brought, was received by such agent in a fiduciary capacity, and that, as the complaint therein contained no such allegation, the motion for judgment on the pleadings in favor of the defendant should have been granted. See *Bartlett v. Sartorius*, 55 Hun., 608.

In subdivision 2 of section 549 of the Code, the words "in a fiduciary capacity," qualify the factor, agent, broker, or other person, therein specified. *Decatur v. Goodrich*, 44 Hun. 3. The statement that defendant, as agent, became possessed of a sum of money, is insufficient under this section. It is necessary to understand that the money must have been received upon some trust or duty in some fiduciary capacity—more than is implied by the word agent. *Id.* It is not every case of agency that renders the agent liable to arrest for moneys received. *Id.*; *Walter v. Bennett*, 16 N. Y. 250; *Greentree v. Rosenstock*, 61 *Id.* 583. There must be some violation of the trust shown; some wrongdoing on the part of the defendant, more than the mere non-payment of money received, even though it was received by an agent. *Decatur v. Goodrich, ante.* The court, in *Stoll v. King*, 8 How. 298, held that the criterion in every such case is to determine whether the specific moneys received ought, in good faith, to have been kept and paid over to the employer; or whether the defendant, upon receiving such moneys, had the right to use them as his own, holding himself accountable to his principal for the debt thus created.

Where a factor, according to the general custom of the trade of which the plaintiff is aware, and in which he had acquiesced in all their dealings for many years mingles the proceeds of the sales, whenever made, indiscriminately with his own funds, and pays by his check on Saturday for all merchandise delivered during the week whether sold or unsold, the relation between the parties is not a fiduciary one, but the ordinary one of debtor and creditor exists. *Donovan v. Connelli*, 9 N. Y. C. P. 222; 3 How. N. S. 525.

Where, therefore, a fiduciary relation is alleged and proven, the case falls within section 549 as amended, and the defendant is advised by such an allegation that a judgment is sought against him, making him liable to arrest. *Wilbur v. Allen*, Supm. Ct., Sp. T., N. Y. County,

Note on Arrest for Misapplication of Property.

March 15, 1889. In this case, the complaint did not allege that the broker acted in a fiduciary capacity, nor was there alleged any violation of trust or wrongdoing, beyond the statement of the non-payment of moneys received as agent, and the court held that it was clearly insufficient to support an order of arrest.

Where the cause of action and the right of arrest are identical, as it is now in such cases under section 549 of the Code, the decision of the question as to defendant's fiduciary relation, on a motion to vacate the order of arrest, will be passing upon the merits of the case, and this the court will not do on motion, unless satisfied, upon the facts, that the court should nonsuit plaintiff, or direct a verdict for defendant at the trial. *Wilbur v. Allen*, *ante*; *Myers v. Coffee*, 4 Law. B. 2; *Honer v. Smith*, 1 Id. 10; *Bachman v. Goldmark*, 48 N. Y. Super. 549.

Though the complaint in *King v. Arnold*, 84 N. Y. 668; 12 W. Dig. 30, on an application for an order of arrest, was held sufficient to give the judge jurisdiction to grant the order, where it alleged that defendant was employed by plaintiff to sell machinery on commission and that no part of the receipts of the sales thereof had been paid, though sales had been made, payment made therefor and proceeds demanded, the case has no bearing upon the subject here discussed, as it was decided prior to the amendment of 1886 to section 549 of the Code. *Hillis v. Bleckert*, Id.

In *Greentree v. Rosenstock*, 61 N. Y. 583, it was said that an action could not be maintained by a principal against a commission merchant to recover damages for an alleged unlawful and fraudulent conversion of the proceeds of goods sold by him, if brought on the theory of a tort. This case was decided prior to the amendment of 1886 to section 549 of the Code. The court, in *Roeber v. Dawson*, 15 N. Y. C. P., 417; 22 Abb. N. C. 73, held that, though prior to such amendment an action to recover moneys converted by the defendant as plaintiff's agent, while acting in a fiduciary capacity, was regarded as an action on contract, and the right to arrest defendant therefor extrinsic, it is, since such amendment, no longer extrinsic to the cause of action, but an essential part of it, and the action is now, by section 549, treated as one *ex delictu*. *Wilbur v. Allen*, *ante*.

A broker, who is employed to buy or sell a particular kind of stock, becomes a fiduciary in regard to the moneys which come into his hands; but, if from time to time the money is deposited by margins with the broker, the fiduciary relation, necessary to authorize an arrest, does not exist between the broker and the customer. *Mann v. Sands*, 2 City Ct. 25.

It was held in *Fuentes v. Mayorga*, 7 Daly. 103, that where goods are consigned to an individual, and he turns them over for sale to a firm of commission merchants, of which he is a member, their failure

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to account for the proceeds, does not render them liable to arrest as fiduciary debtors.

A deposit by a debtor in the hands of a third person of a sum of money, which he directs to be applied to the payment of a debt, will not, where there is no communication with the creditor, create a trust which such creditor can enforce; *Morgan v. Regensberger*, 2 City Ct. 430; *Seaman v. Whitney*, 24 Wend. 260; *Nelson v. Blight*, 1 John. Cases, 205; but if all control or direction over the fund is parted with under an understanding with the creditor to that effect, a trust is created in his favor, which he can enforce against the depositary, with a right to the provisional remedy of arrest. *Morgan v. Regensberger*, *ante*; *Roberts v. Prosser*, 53 N. Y. 260.

And the fact that a factor, to whom goods are consigned, is acting under a *del credere* commission, does not necessarily destroy the fiduciary relation existing between himself and the consignor, and in case he is in fact paid by the debtor, the money so received is not his, but his consignor's money, and for a conversion thereof he is liable to arrest. *Wallace v. Castle*, 14 Hun, 106.

A consignee, by an acceptance of a draft drawn by the consignor upon him, who fails to pay the same out of the proceeds of the consignment, does not cease to be a factor or agent of the consignor; and, in an action to recover the proceeds of the sale of the consignment, an order of arrest is properly granted on the ground that the money was received by him in a fiduciary capacity. *Kelly v. Scripture*, 9 Hun, 283; *Duguid v. Edwards*, 50 Barb. 288. But if the action is brought upon the acceptance, instead of for the proceeds, no order of arrest can be had. *F. and N. Nat. Bank v. Sprague*, 52 N. Y. 605; *German Bank v. Edwards*, 53 Id. 541.

It was held in *Morange v. Waldron*, 6 Hun, 529, that to render a person liable to arrest, under subdivision 2 of section, 179 of the former Code, relating to money received in a fiduciary capacity, the identical money must be the property of the creditor; and the following cases were cited to sustain the proposition; *Stoll v. King*, 8 How. 298; *Republic of Mexico v. Arungois*, 5 Duer, 634; *Duguid v. Edwards*, 50 Barb. 288; *Wood v. Henry*, 40 N. Y. 124; *Lewis v. Pusser*, 53 Id. 260; 1 Wait's Prac. 612-622.

And a person, who causes the owner to ship certain lots of sugar to the several purchasers to whom he had sold them, and to forward to him the invoices and bills of lading, by representing that he had contracted for the sale of the sugars on the authorized terms, though he had made the sales on different terms, occupies the position of factor, and not of broker; and in an action to recover the proceeds of such sales, an order of arrest is proper, under the provisions of the Code

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authorizing an arrest in an action for moneys received in a fiduciary capacity. *The Standard Sugar Refinery v. Dayton*, 70 N. Y. 486.

Where the complaint in an action for money had and received fails to specifically state that the money was received in a fiduciary capacity the judgment, so far as it assumes to authorize the issuing of an execution against the person of the defendant, is erroneous. *Moffat v. Fulton*, 56 Hun, 337. In this case, the trial judge held that the complaint and evidence sufficed to establish the fact that the money was received in a fiduciary capacity; but as there was no such express averment in the complaint, the general term modified the judgment by striking out the provision directing the issue of execution against the person, and, as thus modified, affirmed it without costs.

HENRY DEGENER, Appellant, v. MARY S. STILES, Respondent.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

Foreclosure. Receiver.—In an action for the foreclosure of a mortgage, where the security is ample, the court will not appoint a receiver, and thereby take the possession of the mortgaged premises from the mortgagor before a decree and sale, even though the parties have made an agreement for the appointment of a receiver prior to such time.

Appeal from order denying a motion for the appointment of a receiver in a foreclosure suit.

A. Stickney, for appellant.

R. B. Alling, for respondent.

PER CURIAM.—The claim made by the appellant upon this appeal seems to be that a court of equity is bound to decree specific performance of every contract which may be entered into between parties, no matter whether it appears from the facts of the particular case that it is inequitable and unconscionable so to do or not.

The court of equity was organized to relieve the hardships of the law, and was not intended to enforce or aggravate such hardships. This has always been the cardinal principle governing the administration of justice in courts of equity; and it has been repeatedly held that a court of equity will not lend its hand to aid in the performance of an inequitable act. Therefore, in the case at bar, as it seems that the security is ample, no claim being made but that the mortgage is amply secured, it would be wholly inequitable to take the possession of the property from the mortgagor until it should be done by a decree and sale for

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the purpose of satisfying the amount due on the mortgage. It being inequitable, a court of equity cannot lend its aid to the enforcement of the agreement for a receiver, notwithstanding the parties may have made such a contract.

The order should be affirmed, with ten dollars costs and disbursements.

FRANCES H. DUCLOS *et al.*, Appellant and Respondent, v.
MARY S. BENNER, Appellant and Respondent.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

1. *Will. Construction. Jurisdiction.*—In a former action for the construction of a will, a final judgment was entered, defining the rights of the parties, and granting leave to any party at any time thereafter to apply to the court for further or other relief, as circumstances may require. The petition in this matter alleged that some of the beneficiaries, under the will, had since died without issue, and that a further construction of the will was necessary to determine the rights of the parties. Some of the defendants appeared and filed answers to the petition admitting the facts therein contained, but there was no proof of service upon, nor appearance by, the executor of the testator. Without taking any proofs of the facts alleged in the petition, the court proceeded to construe the will as though such facts had been established. It was held that the court acquired no jurisdiction, as all the necessary parties were not before it, and the facts necessary to be established had not been proved; that it was not sufficient that the parties who appeared, admitted them.
2. *Same. Application at foot of decree.*—Under a general reservation, of leave, at the foot of the decree, to apply for further relief, it seems to be extremely doubtful that the court would have the power to try new issues.

Appeal from an order for the construction of a portion of a will.

C. B. Smith, for plaintiffs.

J. A. Shoudy, for defendants.

Opinion of the Court, by VAN BRUNT, P. J.

VAN BRUNT, P. J.—It is alleged by the petition of the plaintiffs herein that this action was commenced in November, 1878, for a construction of the will of Hiram Benner, deceased, and that such proceedings were had, and that the will was construed and interlocutory judgment entered, and subsequently a final judgment, defining the rights of the parties. In such final judgment, it was ordered and adjudged that any of the parties to the action were at liberty at any time hereafter to apply to the court for further or other relief, as circumstances might require. It is further alleged in the petition that certain of the beneficiaries, under the will, having died without issue, a further construction of the will is necessary to determine the rights of the parties. Some of the defendants appear and file answers to the petition. There is no proof of service upon, or appearance by one of the defendants, Frank M. Benta, either individually or as executor of the last will and testament of Hiram Benner, deceased.

The notice of motion is not addressed to said Benta as executor, and he is, therefore, only made a party to this proceeding as an individual. *Landon v. Townshend*, 112 N. Y. 93; 20 N. Y. State Rep. 223. His presence as executor was absolutely necessary. There is no proof even that Benta, as an individual, has been served. It is true that the papers contain what purports to be an admission by Benta, as an individual, of such service, but this signature is in no way proved. It may be claimed that the affidavit of Joseph M. Duclos proves such signature, but such method of proof of the execution of papers is in no way recognized by statute.

The court, without taking any proof of the facts alleged, then proceeded to construe the will as though such facts had been established. Even if the court could acquire jurisdiction by such a proceeding, all the necessary parties were not before it, as we have seen, and the facts which it was necessary to establish had not been proven. It was not suf-

ficient that the parties who appeared admitted them. The court was bound to take proof of the facts of the death of the *cestui que trust*, and that he died without issue, at least, and this proof could not be supplied by any admission, because the right of the parties appearing to admit anything depended upon the existence of these facts. Furthermore, it is doubtful whether the court could acquire jurisdiction in this summary manner to enter upon a new field of discussion and upon the determination of new issues.

The right to apply at the foot of the decree ordinarily appertains only to the carrying out of the determination which the court, by the decree, has made, and does not relate to the trial and investigation of new issues not embraced within the original action. Whatever directions it might be necessary for the court to give, to carry out its decree, form the fitting subject of an application at the foot of the decree.

By the insertion of the clause in question the court does not seem to have acquired any greater power than has long been the practice of the court of chancery to exercise.

It has always been the practice of a court of equity to hear applications at the foot of its decrees, in reference to the matters embraced within the decrees and adjudicated upon therein. If the court had desired to have reserved any particular question for future consideration, it might possibly have done so by making a reservation in the decree to that effect, but under a general reservation of leave to apply for further relief, it seems to be extremely doubtful that the court would have the power to try new issues.

In any event, in the case at bar, the proper parties were not before the court, and there was no proof before the court which could possibly authorize it to act.

As has already been said, the court should have required legal evidence of the death of the *cestui que trust* without issue, and not have relied upon the mere naked allegation in a petition, even though admitted by a so-called answer.

Opinion of the Court, by VAN BRUNT, P. J.

The order appealed from should be reversed and the petition dismissed, without costs.

DANIELS and BRADY, JJ., concur.

S. SKIDDY COCHRAN, Appellant, v. WILLIAM A. WEICHERS,
Respondent.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

Abatement and revival. Action against stockholder.—An action brought by a creditor against a stockholder to recover his claim against the corporation by reason of the non-filing of the certificate as to the payment of the capital stock, is an action on contract, and not for a penalty, and may, on motion, be revived against the personal representatives of the deceased stockholder.

Appeal from an order denying motion to revive an action as against the executors of the deceased defendant.

H. D. Hotchkiss, for appellants.

Hy. Schmitt, for respondent.

VAN BRUNT, P. J.—This motion to revive was denied, upon the ground that the cause of action set out in the complaint was to recover a penalty and therefore, did not, survive. In this we think the learned judge fell into an error, as the action was not brought to recover a penalty, but to recover a sum which the deceased (under the act under which the corporation was formed of which he was a member), became liable to pay under certain contingencies.

The provisions of the act in question are that in limited liability companies all the stockholders shall be individually liable to the creditors of the company in which they are stockholders to an amount equal to the stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed by such

Opinion of the Court, by VAN BRUNT, P. J.

company has been paid in and a certificate thereof has been made and recorded as therein provided.

Although the deceased has paid in full for his stock, yet still the subsequent conditions in regard to the filing of the certificate as to the payment of the stock have not been complied with; and the defendant became liable under the provisions of this section to the creditors of the corporation for all debts and contracts made by such corporation to the amount of the stock held by him.

The discussion of this question seems to be entirely unnecessary in view of the decision of the supreme court of the United States in the case of *Flash v. Conn.* (109 U. S. 371). That action was brought to enforce a liability under section 10 of the act of the legislature of the state of New York, passed February 17, 1848, commonly known as the manufacturing act. The language of section 10 is identical, with but two insignificant exceptions, with the language which has been quoted from section 37 of the act under which the deceased's corporation was organized, and that action was brought to enforce identically the same liability which is sought to be enforced by this action; and it was there held that the action was not brought to enforce a liability in the nature of a penalty following the decisions upon this point which had previously been made in the state of New York, but a liability arising upon contract.

The order must be reversed, with ten dollars costs and disbursements; and an order entered reviving the action as against the personal representatives of the deceased defendant.

BRADY and BARRETT, JJ., concur.

**JAMES CHASKEL, Appellant, v. METROPOLITAN ELEVATED
RAILROAD COMPANY, Respondent.**

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

1. *Examination before trial.*—Where neither the fact that the plaintiff has reason to apprehend that he cannot have the examination of the defendant at the trial, nor the fact that it is important for him to have such testimony before trial, appears in the affidavit upon which the application is founded, the examination of the defendant before trial should not be allowed.
2. *Same. When vacated.*—The plaintiff should be relegated to the minutes of the corporation for his proof as to whether defendant was, or was not, a director thereof, and unless it appears that there are no such minutes, he should not be permitted to harass the defendant unnecessarily by an order for his examination; and such order should be vacated.

Appeal from an order vacating order for the examination of the defendant.

Lewis Dansers, for appellant.

Davies & Rapallo, for respondents.

VAN BRUNT, P. J.—The order appealed from is clearly right under the rules laid down governing the examination of parties before trial contained in the case of *Jenkins v. Putnam* (109 N. Y. 372). In that case it is distinctly held that certain facts must be made to appear to the judge before such an examination should be allowed, amongst which is the fact that the plaintiff has reason to apprehend that he cannot have the examination of the party at the trial or that it is important for him to have the testimony of the party to be examined before trial, neither of which allegations appear in the affidavit upon which the application in this case was founded. There seems to be no reason, whatever, why the examination should be allowed. It appears from

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the plaintiff's brief that the claim is that a director of a corporation is primarily liable for the acts working a tort by the corporation and if he is correct; in that respect, then he needs no examination of any of the defendants in that regard, showing their assent to the acts done by the corporation.

As to the claim of proving whether the defendant Field was a director or not, the primary source for the proving of such facts are the minutes of the corporation; and until it appears that there are no minutes, the parties should be relegated to that source of information rather than harassing a defendant unnecessarily by an order for his examination.

The order should be affirmed, with ten dollars costs and disbursements.

BRADY and BARRETT, JJ., concur.

KATE F. BROWN, Respondent, v. J. WARREN LAWTON,
Appellant.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

Damages. Conversion of stock.—In an action for the conversion of stock, a verdict for twenty-five dollars per share is not excessive, where the defendant admitted that he had sold some of this kind of stock at some time for \$200 per share, and as witness testified that he had sold to defendant, subsequently to the alleged conversion, a lot of this stock for \$55 per share.

Appeal from a judgment entered on a verdict, and from an order denying a motion for a new trial.

Smith & Bowman, for appellant.

Matthew Daly, for respondent.

BARTLETT, J.—The appellant misapprehends the gist of this action. It is not an action for damages sustained by

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the defendant's fraud, but for money which he received for her upon the sale of certain stock. The complaint, it is true, alleges that in the course of the negotiation, the defendant made false representations to the plaintiff and deceived her as to the price which the purchaser would pay. This, however, was nothing more than a statement of the fraudulent incidents which—the plaintiff says—occurred in the course of the negotiations, and which enabled the agent successfully to deceive his principal as to the amount received for her. These incidents were in the nature of evidence and were not essential to the complaint. The true issue was the narrow one submitted to the jury by the learned judge at circuit. It was this. Did Lawton purchase the stock for himself, directly from the plaintiff for \$2,000, and then lawfully sell it to one Sterling for \$5,000? Or did he sell the stock to Sterling, as plaintiff's agent, receiving \$5,000 therefor, deceiving his principal as to the real purchase-price, accounting to her for but \$2,000, concealing the receipt of the additional \$3,000 and fraudulently retaining the latter sum to his own use? The jury found against Lawton on this issue, and we need say no more upon the subject than that there is nothing in the case to justify our disturbing the verdict.

The only exceptions in this case are to the refusal to dismiss the complaint at the close of the plaintiff's case, and again when the evidence on both sides was in.

The learned judge was entirely right in denying these motions, and in submitting the questions of fact to the jury. He submitted them in a charge of perfect fairness, evincing due consideration for the defendant's position, and dwelling fully and fairly upon every fact which could help him.

Our conclusion is that the appeal on this branch of the case is without merit.

That disposes of the main appeal. The other cause of action brings up a questions of damages. It seems that the plaintiff gave the defendant thirty-seven shares of stock,

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supposing that they were all to be delivered to the purchaser for the \$2,000. It appears, however, that the defendant received the \$5,000 for but twenty-five of these shares, and that, besides the \$3,000 in cash, he has also retained the remaining twelve shares. The plaintiff demanded the latter before this suit was brought, and upon the defendant's refusal to deliver them to her, she included in her complaint a cause of action for their conversion. The verdict upon the main issue also carried the case as to these twelve shares, and the only other question, on that head, is as to the amount of damages. The jury awarded \$300, or twenty-five dollars per share. This certainly was not excessive. The shares had no market value, and the testimony was necessarily limited to special sales and to the condition of the company. The demand was in December 1886, and the defendant, in the latter part of 1885, admitted that he had sold some of this stock for \$200 per share—when, he did not say. A witness (Jando) also testified that he had sold a lot of this stock to the defendant for fifty-five dollars per share—when, does not clearly appear; but it was certainly subsequent to the defendant's sale to Sterling. The latter sale was also to be considered, in connection with the subsequent status of the company.

Upon this testimony, the learned judge properly submitted the question of damages to the jury, and their verdict seems to be reasonable, if not insufficient.

The defendant did not claim that there was no proof of damage to go to the jury. Nor did his motion to dismiss include this point. On the contrary, he requested the court to charge the jury that "a special sale of stock would not fix the market value of it." The court acceded to this request, charged it, and added, that while such a sale would not be conclusive, the jury might consider it in determining the value. This was not excepted to and no further observations upon the subject were made.

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There was therefore no reviewable error, and the evidence of value, though slight, was sufficient to support even a larger verdict.

It follows that the judgment should be affirmed with costs.

VAN BRUNT, Ch J., and DANIELS, J., concur.

WILLIAM H. AVERILL, Respondent, v. AMZI L. BARBER
et al., Appellants.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

1. *Corporation. When a stockholder may sue.*—An individual stockholder has a right to sue in his own name to enforce a cause of action growing out of the alleged misconduct of the directors or managing stockholders, upon a refusal of the corporation to assert its rights, or upon circumstances showing that any attempt to get it to do so, will be ineffectual, where it is friendly rather than hostile to the defendants, and will not enforce the rights which he seeks to assert in his action.

See Note at the end of this case.

2. *Same. Accounting.*—Where the directors have acquired certain patents in their own names, which should have been taken in the name of the corporation, and transferred them to another corporation, a decree that such directors account and pay over all profits realized by them from the patents to the receiver, is proper.
3. *Same.*—The assignee company, if it acquired the patents from the directors, who held the legal title, without notice of any equity existing in behalf of the former corporation, can not be made to account for profits which it has realized from the use of the patents.
4. *Appeal. Intermediate orders.*—Intermediate orders are not reviewable upon an appeal from an interlocutory judgment.

Appeal from an interlocutory judgment directing an accounting by certain defendants to a receiver for all profits, etc., derived by them from patents acquired by them

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which in equity were adjudged to belong to a corporation of which they were directors.

The following opinion was delivered at special term, by PATTERSON, J.:

"This action has been tried in a very unsatisfactory manner, not in consequence of any fault of counsel, (for, so far as it has been heard by me, it has been well and effectively presented by both sides,) but from the fact that the whole of the plaintiff's case has by consent been put in on a record of a trial had a year ago before another judge, and I am obliged to take the evidence into consideration upon his rulings, and to give effect to the testimony then admitted. I have gone over that record with extreme care, and I may say, critically; partly with the view of ascertaining if I could with propriety revise some of the rulings upon evidence. Under the circumstances, I am compelled to adopt those rulings. I should not, perhaps, have made some of them had the questions been presented to me originally, but without the benefit of the arguments made before him, and not knowing what reasons prevailed with the learned judge in admitting evidence, I cannot now undertake to review what he passed upon, and on this submission say what was and what was not (if anything) improperly admitted. It is understood that the exceptions of the defendants to the rulings referred to apply on this trial, and the evidence came in with that understanding. I make these remarks in the outset, because the defendants' counsel has claimed that I should make specific rulings now on every question of evidence passed upon by the learned judge on the former trial. As the record is made, that cannot be done without virtually ordering a new trial, and subjecting the parties to serious expense and delay. I therefore adopt all the rulings made on the former trial.

"There are in reality, but two principal subjects of consideration: *First*. Is the plaintiff entitled to maintain this action as a shareholder in the American Asphalt Company?

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Second. Was it the duty of defendants, Barber, McLain and Langdon, either by agreement or by reason of their relations, as trustees to the American Asphalt Company, upon their acquiring the control of the two De Smedt patents, to transfer them to or hold them for the benefit of the American company?

"1. The right of action for the matters alleged in the complaint inheres in the American company. The testimony establishes that the officers of that company refused to bring the suit. Thereupon the plaintiff, as a stockholder, was entitled to sue. Although brought in his name as plaintiff, the action is really for the benefit of the corporation, and is to enforce a right of the corporation, and not a private right of the plaintiff. He is personally interested only to the extent that he, as a shareholder, would participate in the benefit of a recovery. The whole theory of stockholders' actions in cases like the one at bar may be stated in a very few words extracted from the opinion of the court in *Brinckerhoff v. Bostwick*, 88 N. Y. 52, which was an action by a stockholder, brought against directors of a bank for negligent and improper conduct in their official relations, whereby the bank suffered damage. A request had been made that the receiver of the bank sue the directors, and he declined. The court said (page 56): 'The causes of action set forth in the complaint are losses and misapplication of the funds of the bank through the negligence and misconduct of its directors. For these losses the bank, if still exercising its corporate functions, would have a claim upon the guilty directors which it could enforce by action, but if it refused to prosecute, or if it still remained under the control of the very directors against whom the action should be brought, the stockholders would have a standing in a court of equity to sue in their own names, making the corporation a party defendant. *Robinson v. Smith*, 3 Paige, 222, 223; *Greaves v. Gouge*, 69 N. Y. 154; *Ang. & A. Corp.*, § 310. See review of

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cases in *Heath v. Railway Co.*, 8 Blatchf. 347.' The foregoing citation expresses in brief terms the rule as to the right of the stockholders to maintain an action for a wrong perpetrated by directors to the detriment of the company when the officers of the corporation refuse to institute the suit; or where the directors in control of the corporation are the very persons against whom the action is to be brought. The general idea deducible from the rule, is that the stockholder, suing as a substituted plaintiff for the corporation, is merely asserting the corporate rights, and not his own. The cause of action belongs to it, and not to him.

"It is claimed, however, by the defendants, that the plaintiff cannot maintain this action because of certain alleged false statements and representations made by him as the promoter and organizer of the American Company. The matters referred to grow out of the plaintiff's declarations as to his patents for making asphalt pavements, and are connected with the history of the organization of the American Company, the transfer to it of the assets of the Trinidad Company (so-called), and involve an inquiry into the circumstances under which the American Company was organized, and under which Barber, McLain and Langdon were induced to or did become associated with the enterprise of the American Company. It is at this point of the case that I feel embarrassed by a mass of evidence taken at the former trial. Some of that evidence was received by the learned judge before whom the plaintiff's proof was put in (so far as I am able to gather) on the question of the right of the plaintiff to maintain the action at all upon equitable grounds relating to his good faith; and, looking at an opinion written by that learned judge, I should infer from the conclusion at which he arrived, that he deemed it wise to admit the evidence, rather than reject it, and imperil a possible recovery by the plaintiff on the whole merits. When the case came to me, finding such evidence already

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in, I allowed the defendant to add to it, and so the question is in the case as to the effect to be given to the alleged statements of the plaintiff (conceding they are established,) made at or before the organization of the American Company, concerning his own patents and his control of the De Smedt patents, and as to other representations referred to in the proof on the record, to which special reference is not now necessary.

“The action against the three individual defendants is to hold them to a responsibility incurred in their capacity as directors of the American Company, to compel them to account for property which, it is claimed, they should have acquired for the benefit of that company, but which, it is alleged, they obtained for their own individual benefit, and have held and used for their own behalf; and it is claimed that they are to be charged, as trustees for the company, with the value of that property, and with such profits as they may have realized from the use and control thereof. Alleged frauds of the plaintiff are urged as an affirmative defence going to the direct right to maintain the suit. It is not claimed that he is estopped to sue as a stockholder by reason of any complicity or connivance in the acts of the individual defendants, nor that he has been guilty of *laches*. If such a claim were made, there is absolutely no foundation for it in the evidence. Such matters, if proved, would have been available to defeat the action, but there is no such proof concerning them as would authorize a finding of fact against the plaintiff. The substantive defense is, that the plaintiff, although suing upon a cause of action belonging to the company, cannot maintain the action, because he, as the promoter of the corporation, did or said certain things which amounted to fraudulent acts or representations, whereby the individual defendants were induced to become shareholders, and have been injured. I think this subject must be considered as a question of law; and, if the conclusion at which I have arrived is correct, it is un-

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necessary to make any finding of fact concerning what the plaintiff did or said in connection with the formation of the American Company. If the cause of action belongs to the company, all that the individual defendants could set up by way of defense to it would be such matters as tended to relieve them from responsibility to the corporation. What might have been said or done by persons inducing them to become shareholders, would not relieve them. This may be illustrated by the case of a subscriber sued by the corporation upon his subscription, and who sets up as a defense that the promoters of the company bought property transferred to and for the purposes of the corporation, and from themselves, as vendors, at such exorbitant prices as to amount to a gross fraud. That would not be a defense (*Hornaday v. Railroad Co.*, 9 Ind. 263), and the precise illustration given was in the case of *Dorris v. French* (4 Hun, 292), in which the promoters, owning patent rights of small value, turned them into the corporation at several hundred per cent in advance of their real value, and the defendant sought to escape liability on his subscription on that ground. A gross fraud had been perpetrated, but it was upon the corporation; and so in this case, if there were any wrong in putting in a patent of but small value, or in otherwise causing the capital stock to be issued in payment of comparatively worthless property, it was, as the proof stands, an injury to the corporation, and not to the individual defendants—I mean so far as this action is concerned only. For such injury as they individually may have sustained, the defendants have their appropriate remedies. As nothing that the plaintiff is alleged to have done as a promoter in organizing the company would be a defense to an action by the company against those who were under contract, or owed a duty to it as a corporation, so it cannot be a defense to a suit brought by a shareholder in behalf of the company; and for the simple reason that the court will not try, in an action framed as this is, the particular griev-

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ances the defendants may have against the plaintiff individually, standing in court, as he does, merely to enforce corporate claims. Their wrong to the corporation cannot be excused and remain without redress, because the plaintiff, at some time, himself may have been guilty of an entirely independent wrong against the corporation or against them. If he really committed frauds upon the corporation or upon the individual defendants, he is responsible, but that cannot be urged as a reason for the corporation not recovering in in this action. A plaintiff must enter a court of equity with clean hands—that means concerning the subject matter of the suit. If the plaintiff had done anything concerning the particular cause of action set forth in this complaint, he might be held estopped even from bringing the suit on behalf of the corporation, but no such estoppel can be raised upon the proof, and immunity for the wrong of the defendants (if there be any wrong) cannot be asked, because they choose to charge the plaintiff with having deceived them and others before the corporation was formed. The issue cannot be changed, and the action of the court diverted from the proper subject of litigation by raising such a contest.

“2. It remains, then, to be considered if, on the whole evidence, the defendants Barber, McLain and Langdon have, as directors or trustees of the American Company, made themselves liable in equity to that company for the two De Smedt patents, and the profits derived from their use. I speak of the reissued patents, or those which are now in contest, and I do not intend to consider the plaintiff's claim as to the value of his patents, and the comparative value of the two De Smedt patents before the reissue. The three defendants named were directors of the American Company.

“It is not necessary to cite authorities to the proposition that, if they were under a duty or obligation of any kind to get the control of the De Smedt patents for the benefit of the American Company, they could not do so for their

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individual benefit. The fact is conceded that they did get them, and that they have not transferred them to, nor held them for, nor had them used in any manner to the advantage of, the American Company. This they frankly admit, and in doing so they seek to justify their conduct by circumstances hereinafter to be adverted to. It is claimed by the plaintiff that the defendants Barber, McLain, and Langdon hold the De Smedt patents in trust for the American Company; that they have so held them, since 1881; that they have used them, done work under them and realize large gains therefrom, which should have gone to the American Company; that by agreement of the three defendants named, or some of them, they were to get the control of those patents for the benefit of the company; or that, the company having been organized to work under those patents as well as under Gen. Averill's patents, they were bound on securing them to turn them over to the American Company. As before stated, there can be no doubt that these three defendants did get the control of the De Smedt patents by purchasing a controlling interest in the Anthracite Company for a few dollars, and that they so used and manipulated those patents as to secure the benefit of their use to themselves. I am not satisfied that any specific or express agreement was ever made by either of the three defendants to transfer those patents to the American Company upon obtaining control of them, but these facts are established by uncontradicted testimony. Indeed, all seem to concur in stating it, viz.: that Warren believed the De Smedt patents were the foundation and security of the whole right to carry on the business of asphalt paving, and every one desired and intended that those patents should belong to and form part of the rights of the American Company; and further than that the evidence shows conclusively that both McLain and Barber believed those patents did virtually belong to the American Company, for they thought

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Gen. Averill controlled them, and had put them into that company.

There were nine De Smedt patents in all, and it seems Gen. Averill had but seven of them. When it was ascertained that the two important De Smedt patents were not controlled by Averill, the defendants, or some of them, above named, sought to procure them. It is not all important whether they distinctly contracted to do so or not. They knew they were required by the American Company; that the company was organized to work under them; and they believed those patents to be necessary to the success of that company. Their duty was plain. They were bound to transfer them or hold them for the American Company, of which they were directors. Had the patents not been those under which the American Company was to operate, a different question might be presented; but there can be no doubt that they were required by the company, and that it was supposed by all, when that company was organized, that those very patents were or would become its property. The defendants, upon acquiring them, should have tendered them to the company, and transferred them, on being repaid what they cost; and in not doing so, but holding them for their own profit, they have become liable to the corporation. I have spoken of the three defendants in association without stating the part each took in the transaction, as it is admitted that after the purchase of the Anthracite stock the interests became vested in those three defendants. The only reason assigned for the course pursued by the defendants in retaining these two De Smedt patents, seems to be that stated by McLain, that they wished to protect themselves against Averill, or against loss from their investment in the American Company. But such considerations cannot prevail. Those two patents should have been put into the American Company with the seven other De Smedt patents, and the personal interests of the defendants can no more justify them in retaining this property than if they

had appropriated any other property of the corporation to indemnify themselves against loss from their investment in its stock. I cannot, in this action, appoint a receiver of the American Asphalt Pavement Company, but to make a decree effectual it is necessary that a special receiver should be appointed of the reissued De Smedt patents, and that such patents should be assigned to such special receiver, to hold the same for the benefit of the American Company, and that there also be paid to him such sum as may be awarded as profits against the defendants above referred to, and such receiver act under the orders of the court to be hereafter given.

"Judgment must be entered in accordance with the findings I have made and handed down with this opinion. Mr. George B. Morris will be appointed referee, to take and state the accounts of profits, and Mr. Theron G. Strong will be appointed receiver."

Wm. W. Niles, for Amzi L. Barber and others, appellants ;
A. L. Worthington, for the Barber Asphalt Paving Co.,
appellant.

Thomas Ewing, for respondent.

BARTLETT, J.—The principal questions involved in this appeal are satisfactorily discussed in the elaborate opinion which was rendered in the court below. The proofs warranted the conclusion that the defendants Barber, McLain and Langdon as directors or trustees of the American Asphalt Pavement Company, were liable in equity to account to that corporation for the profits which they derived from the so-called De Smedt patents which they acquired and sought to appropriate to their own use as individuals. The right of the plaintiff as a stockholder of the American Asphalt Pavement Company to enforce the cause of action growing out of the appropriation of these patents depended

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upon a refusal of the corporation to assert its rights, or upon circumstances showing that any attempt to get it to do so would be ineffectual. The evidence of a serious and determined effort on the part of the plaintiff to induce the company or its officers to take appropriate action in the premises was not so clear or conclusive as could be wished; but we are inclined to think it was sufficient to sustain the prosecution of the suit in his own name. He addressed a letter to Mr. Cyrus M. Warren, as president of the corporation, on April 2, 1883, requesting that legal proceedings should at once be taken against the defendants Barber and McLain, by reason of their misconduct and neglect of duty. To this communication he received a response from Mr. Warren to the effect that he had resigned the presidency of the company two years before. With the exception of the assertion contained in this answer, however, there is nothing in the case to show that Mr. Warren had actually resigned, or that his resignation had been accepted. Furthermore, it appears from the evidence of the defendant Barber, that there never was a meeting of the company of any kind since the meeting in April, 1881, when Mr. Warren was elected president in place of the plaintiff. The testimony of the trustees other than the defendants Barber and McLain indicates that those two gentlemen were most active in its management and practically controlled it; and as this suit is based upon their alleged misconduct, these circumstances put the plaintiff in a position to sue as a stockholder in his own name. *Brinckerhoff v. Bostwick*, 88 N. Y. 52, 60.

As we have intimated, it is preferable in this class of cases for the plaintiff to make clearer proof in the first instance of his inability to secure redress by means of corporate action; but in view of the attitude which the American Asphalt Pavement Company itself has assumed throughout the litigation, and of the fact, which is sufficiently manifest, that its attitude in this suit is friendly in-

stead of hostile to the defendants Barber and McLain, we are unwilling to grant a new trial simply because the court might properly have required the plaintiff to prove more positively than he did that the corporation would not enforce the rights which he seeks to assert herein.

Upon the present appeal a separate brief has been filed in behalf of the Barber Asphalt Paving Company, one of the defendants. The complaint charges that the defendants Barber, McLain and Langdon, having acquired the De Smedt patents in controversy, have in their own names individually and in the name of the Barber Asphalt Paving Company, and in the names of other persons unknown, made and fulfilled contracts for the manufacture and laying of pavements in various cities of the United States. This appears to be the only allegation of fact against the Barber Asphalt Paving Company. The findings of the court are to the effect that the Barber Asphalt Paving Company is a foreign corporation, organized under the laws of West Virginia, of which the defendant, Amzi L. Barber, is the president; that the nominal title to the said De Smedt patents is in the defendant, Barber, in trust for the Barber Asphalt Paving Company; and that it does not appear that the Barber Asphalt Paving Company, as a corporation, has done anything contrary to equity and good conscience, or that such company or its board of directors or trustees has ever had any direct connection whatever with the De Smedt patents, or has in any way approved, ratified, adopted or interfered with the transactions of the defendants, Barber and McLain, in regard to said patents. The judgment based upon these findings directs: First, that the defendant, Barber, not only individually, but as trustee for the Barber Asphalt Paving Company, assign all right, title and interest in and to the said De Smedt patents to a special receiver, who shall hold them in trust for the American Asphalt Pavement Company; and furthermore, that the Barber Asphalt Paving Company, as well as the

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defendants, Barber, McLain and Langdon, account and pay over to such receiver all profits made by them or either of them, directly or indirectly, out of the said De Smedt patents.

We are unable to perceive anything in the proof or findings sufficient to sustain the judgment, so far as it relates to the Barber Asphalt Paving Company. It was proper to decree that the defendants Barber, McLain and Langdon should account for and pay over all profits realized by them out of their purchase of the De Smedt patents, which they assumed to acquire for themselves individually when they ought to have acquired them for the American Asphalt Pavement Company; but if these patents, to which they held the legal title, have been transferred to the Barber Asphalt Paving Company without notice of any equity existing in behalf of the American Asphalt Company, there is no principle of law upon which the Barber Asphalt Company can be made to account for profits which it may have realized from the use of the patents. These views lead to the conclusion that the judgment should be reversed so far as it relates to the Barber Asphalt Paving Company.

The notice of appeal attempts to bring up for review a number of intermediate orders granted in the cause at various stages of its progress. Unless separately appealed from, these are only reviewable upon an appeal from a final judgment (Code Civ. Pro., § 1316); and the decree of the court below, now under consideration, is an interlocutory and not a final judgment.

The interlocutory judgment should be affirmed as to all the appellants except the Barber Asphalt Paving Company; and so far as that corporation is concerned, should be reversed, with costs.

VAN BRUNT, Ch. J., and DANIELS, J., concur.

Note on Right of Beneficiary to Bring and Maintain Suit.

NOTE ON RIGHT OF BENEFICIARY TO BRING AND MAINTAIN SUIT.

It may be laid down as a general rule that the real party in interest, or a person who has an interest, may bring an action to protect or preserve his rights or property, where those whose duty it is to do so have refused, on demand, to take any legal steps to accomplish this result. The most common cases are those where a stockholder is compelled to prosecute an action in behalf of himself and other stockholders, but creditors, legatees, and others are entitled to the same relief under proper circumstances.

Corporations.—It is a well settled proposition that when a party having the power and charged with the duty to become a plaintiff and prosecute an action for a private remedy refuses to do so, another, or others, having a financial interest, actual, contingent or remote in the subject of the cause of action and in the relief, may bring an action making such party and the one against whom the relief is sought, parties defendant. The office of the nominal plaintiff in such case is to bring the proper parties before the court that it may be set in motion to adjudicate between them. *Overton v. Village of Olean*, 37 Hun, 47. This method is applicable to cases where the relation of trustee and *cestui que* trust exists, and may be applied to a municipal corporation which refuses to perform a plain duty in which the corporations are interested, and by the non-performance of which they will be prejudiced. *Id.* In this case, the officers of the village had refused, when requested to do so, to bring an action to restrain a railway company from substantially obstructing and destroying the use of one of the public streets, and the court held that an adjoining property owner might make such village officers and the company parties defendant to an action for such purpose, and so enable the court to give such directions as might be necessary to protect and preserve his right.

Where the shareholders are numerous, the suit may be brought by one or more in behalf of all. *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Butts v. Wood*, 37 Id. 317; *Robinson v. Smith*, 3 Paige, 222; *Hichens v. Congreve*, 4 Russ. 562; 4 Blatchf. 347.

Where the officers of a corporation have the corporate assets in their possession, the corporation, and not the stockholders therein, is the proper party to bring an action to compel them to account, unless it appears that it is necessary, in order to prevent a complete failure of justice, for the stockholders to bring the action. *Byers v. Rollins*, 21 Pac. Rep. 894. But in such case, the corporation must be made a party defendant. *Id.*

It was held in *Gray v. N. Y. & U. S. Co.*, 3 Hun, 383, that a stockholder in a corporation can, in behalf of himself and other stockholders similarly situated, maintain an action against such corporation and its directors, to set aside and enjoin transactions done by such directors.

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in the name of the corporation, for their own personal gain and benefit, and in fraud of the rights of the plaintiffs and other *bona fide* stockholders, when the directors have been requested to bring such action and have refused.

Where a majority of the trustees of a religious corporation are engaged in the commission of a wrongful diversion of its property, a minority of the trustees remaining loyal, though consisting of a single person, may maintain an action against them, in the name of the corporation, to enjoin such mal-administration of property. *First Reformed Presbyterian Church v. Bowden*, 14 Abb. N. C. 356. And, it seems, that if all the trustees were engaged in the wrong, any private member of the corporation may bring an action for the benefit of himself and the other members, joining the corporation and trustees as defendants. *Id.*

The stockholders of a national bank may bring an action against the trustees to recover for waste and loss of the corporate assets, caused by their gross negligence, where the bank is still under the control of the accused trustees. In such case, the corporation is necessarily a party defendant, and if a receiver has been appointed, he should also be joined. *Hand v. Atlantic National Bank*, 55 How. 231.

It was held in *Smith v. Rathbun*, 66 Barb. 402, that where directors of a banking institution knowingly and in violation of their duty commit fraud upon the interest committed to their charge, or knowingly allow it to be done by one or more of their associates or chosen officers, they become answerable individually to stockholders or other beneficiaries of the fund, on the basis of the fraud. See *Cunningham v. Pell*, 5 Paige, 607; *Carpenter v. Danforth*, 52 Barb. 584.

Where a board of directors of a plankroad company audit a bill for extra services rendered by a member of the board who was included to constitute a quorum, and acted with the board, any stockholder may sue for himself and any other stockholder who makes himself a party, to prevent the payment of such bill by the treasurer of the company. *Butts v. Wood*, *ante*.

Where the stockholders are permitted to bring suit in their own names on the ground that the directors have refused to sue, the corporation must be made a party defendant. *Slattery v. Transportation Co.*, 4 S. W. Rep. 79; *Taylor v. Holmes*, 8 Sup. Ct. Rep. 1192; *Stromeyer v. Combes*, 2 N. Y. Supp. 232.

Demand and refusal.—In an action by a stockholder to restrain the wrongful acts of the officers of a corporation, he must aver that the corporation has refused to bring the action. *Leslie v. Lorrillard*, 31 Hun, 305. An allegation that the corporation has neglected to bring such action, is not equivalent to an averment that it has refused so to do. A refusal of the board of directors in such a case is essential in

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order to give the stockholder any standing in court. *Id.* It is not necessary to go so far as the United States supreme court went in *Hawes v. Costa Water Company*, 21 Am. L. Reg. N. S. 252, where, though the complaint averred that the president and board of directors, on application, wholly declined to take any proceedings whatever in the premises, the demurrer was sustained on the ground substantially that this allegation did not show such a distinct and unqualified refusal as the law required, to vest the right of action in the stockholder. *Id.*

Where a stockholder brings an action for losses sustained by the misconduct of the officers of a corporation, after request and refusal on the part of the corporation, the complaint must allege that the corporation, on being applied to refuses to prosecute, and is defective and insufficient without such averment. *Greaves v. Gouge*, 69 N. Y. 154. Such an allegation constitutes an essential element of the cause of action, even though the loss is peculiar to the stockholder, and is caused by the depreciation of the market value of the stock. *Id.*; *Smith v. Rathbun*, *ante*.

An action for injuries caused by the fraudulent acts, misapplication or waste of corporate funds and property by an officer of the corporation must be brought in the name of the corporation, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In such case, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated. The corporation must necessarily be made a party defendant in such action. *Greaves v. Gouge*, 69 N. Y. 154; *Smith v. Rathburn*, 22 Hun, 150.

Unless a corporation, either actually or virtually, refuses to bring suit, the stockholders individually can maintain no suit for equitable relief against the directors and officers for mismanagement and negligence. *Doud v. Railway Co.*, 25 N. W. Rep. 533; *Boyd v. Sims*, 11 S. W. Rep. 948. An allegation that the stockholders repeatedly protested against the evils complained of, without stating that such protests were made to the directors, is entirely insufficient to authorize them to sue. *Boyd v. Sims*, *ante*. The request to the corporation must not be a simulated, but an actual, request, *Bacon v. Irvine*, 11 Pac. Rep. 646; *Dannmeyer v. Coleman*, 11 Fed. Rep. 97; and the refusal of the directors to sue must be real, persisted in after earnest efforts to overcome it, and not the result of collusion. *City of Detroit v. Dean*, 1 Sup. Ct. Rep. 560; *Rathbone v. Gas Co.*, 8 S. E. Rep. 570; *Alexander v. Searcy*, *Id.* 630.

To enable a stockholder to maintain an action in his own name to have certain bonds issued by the president, who is also general manager, of a railroad company, declared *ultra vires*, a demand upon, and

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refusal by such officer to bring such suit, are sufficient. *City of Chicago v. Cameron*, 11 N. E. Rep. 899.

A stockholder is not excused from applying to the directors to sue before bringing suit himself, from the fact that the treasurer of the corporation, of whose misconduct complaint is made, owns the major portion of the stock. *Dunphy v. Association*, 16 N. E. Rep. 426; *Allen v. Wilson*, 28 Fed. Rep. 677.

A stockholder must show that he has exhausted all means within his reach to obtain redress within the corporation, before he is permitted to maintain an action to set aside a contract made by the directors. *Dumpfelf v. Railway Co.*, 3 Sup. Ct. Rep. 573; *McHenry v. Railroad Co.*, 22 Fed. Rep. 130; *Foot v. Mining Co.*, 17 Id. 46; *Bill v. Telegraph Co.*, 16 Id. 14; *City of Quincy v. Steel*, 7 Sup. Ct. Rep. 520.

When excused.—The stockholder, in an action by him against an insolvent corporation to have his share of the assets given priority over the claim of a creditor, who, he alleges, fraudulently induced him to become a stockholder, need not aver any effort to procure the corporation to begin the action. *Poole v. Association*, 30 Fed. Rep. 513.

A stockholder and bondholder of an insolvent corporation may maintain an action against the corporation, its directors and other persons, to rescind an unlawful contract made by certain of the defendants with the corporation, etc., without first making a demand upon the corporation to bring an action to redress the wrongs complained of, where the corporation is obviously unable to act by reason of being under the control of the very persons who must be the defendants in the proposed action. *Currier v. N. Y., W. S. & B. R. Co.*, 35 Hun, 355; *Brinckerhoff v. Bostwick*, 88 N. Y. 56; *Gray v. N. Y. & V. S. S. Co.*, *ante*.

Where the board of directors of a corporation is acting in a manner destructive of the rights of the other shareholders, or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other stockholders and which can only be restrained by the aid of a court of equity, an action to obtain relief may be maintained by a stockholder, without showing an active effort on his part with the body of the corporation affected to induce remedial action on its part, where such effort can be of no avail. *Barr v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 444, *Hawes v. Oakland*, 14 Otto. 450.

An action against the directors of a national bank to recover for losses of corporate funds, suffered through their gross negligence and inattention to the duties of their trust, should in general be brought in the name of the corporation; but if it refuses to prosecute, the stockholders, who are the real parties in interest, will be permitted to

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sue in their own names, making the corporation a defendant. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 N. Y. 154. And this course of proceeding is also allowed if it appears that the corporation is still under the control of those who must be made the defendants in the suit. *Brinckerhoff v. Bostwick*, *ante*; *Butts v. Wood*, 37 N. Y. 317; *Robinson v. Smith*, 3 Paige, 222. In such cases a demand upon the corporation to bring the suit would be manifestly futile and unnecessary. *Id.* A national bank, after the appointment of a receiver, cannot sue; and where the receiver is one of the directors chargeable with neglect of duty, he is not a proper person to whom to intrust the conduct of the action, even though he consented to institute it, or the comptroller of the currency should direct him so to do. *Id.*

The president of a corporation, who is a trustee, may authorize and maintain an action in the name of a corporation without the authority of the board of trustees, and against its express direction, where a majority of its members are engaged in the wrongful diversion of the corporate funds, or other injury to its business, and the neglect to sue or the resolution to discontinue suit or suits already commenced to recover the moneys diverted, or to remedy the wrong and injury committed, are simply acts in furtherance of such breaches of trust. *Recamier Mfg. Co. v. Seymour*, N. Y. Com. Pl. 1889. In such a contingency, any trustee not implicated in the wrong may authorize the bringing of the action which the board of trustees should have authorized. *Id.*

Administrator, etc.—Where an administrator, or assignee for the benefit of creditors, are either in collusion with the party who is holding property alleged to have been fraudulently transferred, or where it is actually claimed by such administrator or assignee, or where the trustee unreasonably refuses to sue, the creditors or other persons interested may themselves bring an action for, or reclaim, such property, and make the transferees and the trustee parties to the action. *Harvey v. McDonnell*, 113 N. Y. 526; *Dewey v. Moyer*, 72 N. Y. 70; *Bate v. Graham*, 11 Id. 237; *In re Cornell*, 110 Id. 351; *Ft. Stanwix Bank v. Leggett*, 51 N. Y. 552. In such action, it is not necessary that the creditor is a judgment creditor, as he stands in the place of the trustee. *Id.*

Creditor.—A person, who holds bonds of a railway company secured by a mortgage, made to a trustee, can intervene in an action to foreclose such mortgage, and although not a party thereto, move to set aside an order appointing a receiver on the ground of want of jurisdiction in the judge making it, and for an order appointing a receiver. *United States Trust Co., v. N. Y., W. S. & B. R. Co.*, 6 N. Y. C. P. 90; *Gould v. Mortimer*, 26 How. 167; 16 Abb. 448; *Weetgen v. Vibbard*,

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5 Hun, 265; *Brinkerhoff v. Bostwick*, 88 N.Y. 52; *Hawes v. Oakland*, 104 U. S. 450.

Positive misappropriation of the trust by some of the trustees, with a silent connivance therein by the others, will probably prove sufficient to enable the beneficiaries to maintain an action in equity for their own protection. But where such connivance is not shown, or the innocent trustees have not refused to institute the proper proceedings, the case does not call for their active interposition. *Weetgen v. Vibbard*, 5 Hun, 265; *Western R. R. Co. v. Nolan*, 48 N.Y. 513.

Ordinarily, a creditor of an insolvent estate cannot maintain an action against a fraudulent vendee alone, or against him and the executor or administrator, to set aside the fraudulent transfer, and have the property held under it administered as assets to pay debts; but if the executor or administrator collude with such fraudulent vendee, or after reasonable request refuse to take proceedings to impeach his title, a creditor may maintain an action against him and the executor or administrator for that purpose. *Bate v. Graham*, 11 N. Y. 237.

And where a devastavit has been worked by the personal representatives, a creditor may follow the property, if in existence, and have it impounded for the purpose of administration as assets. *Everingham v. Vanderbilt*, 51 How. 177; *Long v. Majestie*, 1 John. Ch. 305; *McDowl v. Charles*, 6 Id. 132.

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ALICE M. BARROWCLIFFE, Respondent, v. HENRY CUMMINS *et al.*, Appellants.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

Pleading. Supplemental answer.—A motion for leave to interpose a supplemental answer in an action brought by an assignee to recover the possession of certain shares of stock, setting up, in bar of the present action a judgment rendered in an action brought by the assignor against the same defendant to recover shares of the same stock, is properly denied, where the transfer was made prior to the commencement of the assignor's action.

Appeal from an order denying a motion for leave to serve a supplemental answer.

John Cummins (*J. Warren Lawton*, of counsel), for appellants.

Edward P. Wilder, for respondent.

BARTLETT, J.—The defendants sought to interpose a supplemental answer alleging the rendition of a judgment after the commencement of this action, which determined the matters in controversy between the parties to this suit, or a portion of such matters. In opposition to the motion, the judgment roll in the action referred to in the proposed supplemental answer was produced and read, and the application was denied, for the reason that the issues involved in the other case were not the same as those involved herein, and because there was no such privity between the plaintiff in that case, and the plaintiff in this as would make that judgment binding herein.

This action is brought to recover the possession of 700 shares of capital stock of the Electro-Graphic Manufacturing Company, together with certain dividends paid thereon. The plaintiff derives such title as she has to this stock from

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one Charles B. Hall. The judgment which the defendants seek to set up by way of supplemental answer, was rendered in a suit against them by Hall; and in his complaint in that suit Hall expressly alleges that before the commencement of that action he assigned and transferred to Alice M. Barrowcliffe 700 shares of the stock of the Electro-Graphic Manufacturing Company. From this allegation it is evident therefore, that the plaintiff in the present action acquired her title to the 700 shares of stock which constitute the subject-matter of this litigation before the beginning of the suit wherein the judgment was rendered of which the defendants now desire to avail themselves as a bar. Under these circumstances it is impossible to perceive any theory on which that judgment can be deemed binding upon the present plaintiff, or can be held to affect her rights. If Hall had transferred his interest in the stock to her, subsequent to the rendition of a judgment in a suit between him and the defendants, which judgment had established some rights in such stock on the part of the defendants, this plaintiff would perhaps have taken the stock subject to those rights; but she cannot be affected by any adjudication, with reference to the stock in a suit instituted by her assignor after he had wholly parted with his interest therein.

It being thus apparent that the judgment, even if pleaded by way of supplemental answer could avail nothing to the defendants, their motion was properly denied, and the order denying it should be affirmed, with costs and disbursements.

VAN BEUNT, Ch. J., and BRADY, J., concur.

DORINDA ARMSTRONG *et al.* v. ARCHER WEINSTEIN.

N. Y. Supreme Court, First Department, General Term, July 9, 1889.

1. *Sale of infant's real estate. Jurisdiction.*—In proceedings for the sale of an infant's real estate, the court does not possess any jurisdiction whatever to construe a will, and determine the question, or allow a special guardian to ascertain what interest the infant has, under the will, in the real estate, or whether or not it is in a condition to be sold under statutory proceedings.
2. *Same. Specific performance.*—The court cannot make a title open to a reasonable doubt a marketable one by passing upon an objection depending on a disputed question of fact or a doubtful question of law in the absence of the party in whom the outstanding right is vested, and will not compel a purchaser in proceedings to sell an infant's real estate to take a title based upon the question of an implied power of sale, where no adjudication binding upon the infant has been had.

Controversy submitted upon an agreed case.

J. Delehanty, for appellant.

A. Stern, for respondent.

VAN BRUNT, P. J.—The facts appearing upon the submission are that on the 21st of December, 1872, one Hamilton Armstrong, then the owner in fee of the premises in question, died, leaving a last will and testament, which was duly admitted to probate, and letters testamentary thereon issued to the plaintiff, Dorinda Armstrong, Edward Martin and P. T. O'Brien; that said Hamilton Armstrong left him surviving his widow the plaintiff, his daughters Sarah Bogg and one Eleanor L. Armstrong, an infant of the age of seventeen, and one Dora Armstrong, since deceased, intestate, who was never married and left no

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descendants ; that on the 8th of February, 1889, the defendant, being desirous to purchase said property, entered into an agreement in writing with the plaintiff for the purchase of the premises, and paid to the plaintiff the sum of \$500 as a deposit ; that thereafter, on the 23d of February, 1889, the supreme court, on an application therefor by the plaintiff, appointed the plaintiff John Berry special guardian of said infant, and authorized and empowered him to contract for the sale and conveyance of the interest of said infant in said premises ; that the said special guardian did enter into a contract with the defendant for the sale of said infant's interest in said premises ; that the plaintiffs have always been ready and willing, and still are ready and willing, to perform said agreement on their part, and in pursuance of said agreement tendered on the 22d of April, 1889, to the defendant, deeds of the premises pursuant to said agreement, and that the defendant refused to accept said deeds and pay the balance of the purchase money, alleging as his reasons for so doing that the executors in said will named have no power to sell and convey said premises during the life of the testator's widow ; and, secondly, that the court had no jurisdiction to order a sale of said interest in said premises of said infant, because said Eleanor L. Armstrong is not seized of any estate in said premises as tenant in common or otherwise, and that a sale thereof would be contrary to the terms of the will. The plaintiff demands judgment for a specific performance of the contract, and the defendant demands judgment that he be released from his contract and be repaid the sum of \$500 and interest.

The provisions of the will, so far as they are pertinent to the questions involved upon this appeal, are as follows:

Second. I give devise and bequeath to my said executors, and the survivor of them, all the estate and property, both real and personal whatsoever and wheresoever situate, of which I may die seized and possessed, upon the trusts

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and for the purposes following, that is to say, first, to pay over to my said wife, during her life-time, net interest and income, rents, issues and profits of my estate, and to allow her the free and entire use and enjoyment of all my household furniture and other personal property, the above devise, however, being upon the express condition that she shall suffer and permit all my children—while minors—to live with her, and that she shall support them until they respectively arrive at the age of twenty-one years, or until their respective marriage, and I do therefore give to and confide in them, and the survivors of them, their care and custody while minors, and entrust them with their care and education, hereby appointing them their general guardians.

Third. Upon the death of my said wife, I direct that all my estate, both real and personal, be sold and disposed of, and the proceeds thereof be divided, share and share alike, among all my children. As to such of my children as may be minors at the time of such partition, I further direct that their respective shares be held in trust by the said Edward Martin and Patrick F. O'Brien, or the survivor of them, for the benefit of my said children until they shall severally arrive at the age of twenty-one years, the income of said shares to be applied, however, to or towards the education and support of the minor entitled to the same. For the purpose of carrying into execution the provisions and directions to this, my will, I authorize and empower my said executors, and the survivor of them, to sell and convey any real estate, whether held at the time of my death in severalty or in common with any other person or persons, and to execute all proper deeds, conveyances and assurances for giving effect to the same."

It depends upon the construction of this will as to whether the plaintiff's executors have a power of sale, and, secondly, whether the court has any power to, order a sale of the infant's interest in this real estate, if any she has.

These questions are discussed at length by the counsel for

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the various parties, but we are unable to see how any authoritative adjudication as to that will can be made in this action. The special guardian has no power committed to him by his appointment, to bind the infant whom he represents, by any adjudication which may be made upon the subject of this title. No such duty has been confided to his care, and even if it should be held that this title was good, yet the infant could attack it, and not in any way be bound by the judgment which is sought to be entered upon this submission. There has been no such trust committed to the special guardian. There is no statement that the claim, in regard to the interests of this infant, was submitted to the court, and her interest, in that regard, committed to his care, such as would be the course had he been appointed her guardian *ad litem* in a proceeding for the construction of this will. In fact, the court, by the proceedings which have been initiated for the sale of this infant's interest in this real estate, have not had conferred upon them any jurisdiction whatever to determine the question, or to allow her special guardian to ascertain for her what interest she may have in this real estate, or whether it is in a condition to be sold under statutory proceedings, or not.

Under these circumstances, under the well established rules laid down governing actions for the specific performance of contracts in reference to the purchase of real estate, unless the title is good beyond a reasonable doubt, the defendant will not be required to take it.

It is true that objections which are merely captious, or mere suggestions of defects which no reasonable mind would draw, although within the range of possibility, or those which are clearly invalid by the law as settled, whatever doubts may at a former time have existed as to the questions raised, are not available to the purchaser, and will be disregarded.

In the case of *Fleming v. Burnham* (100 N. Y. 1), it was said: "But the question presented to the court on an appli-

cation to compel a purchaser on a judicial sale, who raises objections to the title tendered, to complete the purchase, is not the same as if it was raised in a direct proceeding between the very parties to the right. Where all the parties in interest are before the court, and the court has jurisdiction to decide, they are concluded by the judgment pronounced so long as it stands unreversed, however imperfectly the evidence or facts were presented upon which the adjudication was made, or however doubtful the adjudication may have been in point of law.

But the court stands in quite a different attitude where it is called upon to compel a purchaser to take title under a judicial sale, who asserts that there are outstanding rights and interests not cut off or concluded by the judgment under which the sale was made. The objection may involve a mere question of fact, or it may involve a pure question of law upon undisputed facts. In either case, it may very well happen that the question is so doubtful that although the court would decide it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceeding to compel a purchaser to take title, and would relieve him from his purchase. The reason is obvious. The purchaser is entitled to a marketable title.

A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding.

The cloud upon the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have."

It is therefore clear that the court not having jurisdiction to pass in this action upon the rights of the infant under

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the will in question, so as to be binding upon her, no adjudication can be made in reference to the construction of this will, such as would be binding and relieve the purchaser from any doubt concerning his title. It is apparent from the nature of the briefs which have been submitted upon this question, that it is a question which is open to reasonable doubt.

It is by no means certain, or at least not so certain as to preclude a purchaser from raising the objection, as to what would be the result of a consideration of those questions.

The doctrine of implied power of sale, of which the plaintiffs seek to avail themselves, is certainly an obscure and uncertain one. The question as to whether the fee of this property remained in the trustees, or descended to these children, is certainly, as far as the plaintiff's claim is concerned, open to challenge.

Under these circumstances, the court would not and should not compel a purchaser to run the risk of taking this title, having no adjudication which would be binding upon the infant who may become interested in this estate.

We think, therefore, that the purchaser should be relieved from his purchase, and that he should have judgment for his \$500 and interest, but under the circumstances, without costs.

DANIELS and BRADY, JJ., concur.

FLORA E. GRAVES, Respondent, v. FREDERICK L. SANTWAY, Appellant.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Appeal. Nonsuit.*—In considering on appeal the question of law presented by an exception to the denial of a motion for a nonsuit, the plaintiff is entitled to have the evidence construed in a manner most favorable to his position. The question cannot be taken from the jury, nor their conclusion set aside, unless the facts are free from every reasonable doubt.

See Note at the end of this case.

2. *Evidence. Explanation.*—A witness may be allowed, on redirect examination, to explain a remark made by one of the parties in a conversation with him which was properly drawn out in the witness' cross-examination, by giving the whole of the conversation, in order to prevent or rebut any adverse or damaging inferences.
3. *Same. Expert witness.*—It is the province of the trial judge to determine whether a witness is qualified to speak as an expert.
4. *Same. Rebuttal.*—In an action for malpractice brought against a surgeon, where several witnesses have been called by him in defense, to vindicate the operation, and he himself, as a witness, has minutely stated the condition in which he found the parts before and during his operation, it is proper to permit the plaintiff to introduce, in rebuttal, expert testimony to show that the operation was unnecessary.

Appeal from a judgment entered on a verdict.

Action against a physician for malpractice. The defendant, when plaintiff rested, moved for a nonsuit on the ground that plaintiff had failed to prove a cause of action. The motion was denied and the defendant took the following exceptions.

“*First.* To that branch of the charge submitting to and instructing the jury to find whether defendant used diligence and reasonable knowledge and care to ascertain if it was a proper operation under the circumstances of the case.

“*Second.* To that branch of the charge submitting

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whether defendant used reasonable care to learn what the physical condition of the plaintiff was, and whether the operation performed was a proper operation under the circumstances of the case.

“*Third.* To that branch submitting whether or not the operation was negligently performed.

“*Fourth.* To that branch submitting whether or not the defendant used reasonable care, and properly instructed plaintiff as to her conduct, and as to what she should do in case of an emergency, and whether it was negligence in defendant if he gave her no instructions whatever in relation to her future conduct.

“*Fifth.* To that branch submitting whether defendant was negligent in making the diagnosis of the case, or in performing the operation, or in failing to give proper instructions to plaintiff for future guidance; and defendant excepts to the instruction to the jury that if defendant was found negligent in any one of these respects, and if the other conditions in the charge were found against defendant, then defendant was liable.”

The complaint alleged that the defendant is a physician and surgeon, and that he “did forcibly, unskillfully, and negligently operate upon plaintiff by unskillfully and negligently inserting instruments into the womb and neck of her womb, or uterus, and parts adjoining thereto, and so forcibly, unskillfully, and negligently performed said operation as to cause plaintiff great pain and suffering, and great loss of blood, and physical weakness.” The complaint also alleges “that she did not require an operation, as advised by the defendant as aforesaid, or any operation whatever, and that any operation by defendant in that behalf was improper and unprofessional.” It also alleges that prior to the operation plaintiff was in good health, and free from pain, and that immediately after the operation, “and on account thereof, plaintiff became weak and emaciated, and unable to do any manual labor, and ever since

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said operation has been confined to her bed, on account of said operation, the greater portion of the time; that, by reason of said operation as aforesaid, plaintiff has suffered great bodily pain almost constantly since the defendant performed the said operation as aforesaid, and is now unable to attend to the usual household duties, or to do any labor requiring physical strength or exertion."

W. F. Ford and D. Bearup, for appellant.

Charles M. Thompson and Watson M. Rogers, for respondent.

HARDIN, P. J.—*First.* When the plaintiff rested, the defendant moved for a nonsuit "on the ground that plaintiff has failed to prove a cause of action." The motion was denied, and the defendant excepted. In considering the question of law presented by the exception, the plaintiff is entitled to have the evidence construed in a manner most favorable to her position. "All that the evidence in any way tends to prove must be deemed as fully proved; every fact which the testimony and reasonable inferences from it conduce to establish must be assumed to be established. The question could not be taken from the jury, nor their conclusion set aside, unless the facts were free from every reasonable doubt." *Harris v. Perry*, 89 N. Y. 311, opinion of DANFORTH, J., and cases there cited.

The evidence disclosed that the defendant was a physician and surgeon, and had treated the plaintiff for various ills prior to the 22d of July, 1887, and on that day she visited his office, some four miles and a half from her home, and, relying upon his assurance, declarations, and advice, submitted to a surgical operation at the hands of the defendant upon the mouth and neck of the womb, for the purpose of removing sterility. Her testimony is to the effect that the defendant said the operation was a necessary and proper one to attain the object in view; that she was

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assured that the operation would be painless, and would not subject her to sickness or inconvenience, whereas, in truth it was exceedingly painful, and was followed by extensive hemorrhages, and that her health was impaired thereby; that she suffered greatly from the loss of strength and health, and was incapable of attending to her household affairs, and that for a long time she continued in pain and sleeplessness, and that the operation brought on leucorrhœa. Evidence was given in behalf of the plaintiff tending to establish that the operation was not necessary to effect the purpose; that it was done negligently and improperly as to time and place; and that she did not receive the necessary and suitable advice and treatment after the operation. Upon the evidence in the case when the trial judge was called upon to decide the motion for a nonsuit, questions of fact were presented which it was the province of the jury to pass upon. "The law implies a promise on the part of the surgeon that he has ordinary skill, and that he will execute the business intrusted to him with ordinary care and skill. If he fails in this duty he is guilty of default in his undertaking, and cannot collect the pay for his services, but is liable in damages to the persons who employed him." *Bellinger v. Craigue*, 31 Barb. 534.

In *Carpenter v. Blake* (10 Hun, 358) the rule of law is stated as follows: "One who offers himself for employment in a professional capacity undertakes (1) that he possesses that reasonable degree of learning and skill which is ordinarily regarded by the community, and by those conversant with the employment, as necessary to qualify him to engage in such business; (2) that he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge, to accomplish the purpose for which he is employed; (3) that he will use his best judgment in the exertion of his skill and the application of his diligence."

This case was affirmed in 75 N. Y. 12, and it was there

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held: "It is not necessary, in order to sustain an action for malpractice against a surgeon, that there should be proof of gross culpability on his part. Having engaged in the performance of services requiring skill and care, he is liable for a want of the requisite skill, or for an omission to exercise proper care."

We think the trial court properly denied the motion for a nonsuit as the case then stood.

Second. Plaintiff called Cheesman as a witness to describe the condition of the plaintiff as he observed it in and about her house after the operation. In the course of his cross examination he was asked in respect to a conversation held by the plaintiff with her mother, in regard to the defendant. In the re-direct examination, by way of cross-examination, the plaintiff was allowed to ask the witness to explain what the remark was, and the witness said that he heard the plaintiff say in that conversation which was alluded to in the cross-examination, viz.: "Look out for that fellow in there, or he will be butchering her next." Apparently this answer was taken by way of cross-examination or explanation by the witness on the subject which he had been required to refer to in the cross-examination had by the defendant. The general rule as to the extent to which cross-examination may go is largely in the discretion of the court.

In *Blumenthal v. Bloomingdale* (100 N. Y. 561), it appears the witness had been allowed to explain and give the whole of a conversation which had been properly drawn out in his cross examination, and it was said, viz.: "Plaintiff might prove the whole to prevent or rebut any adverse or damaging inferences."

Third. Miss Dell Dresser, a young lady twenty-four years old, who was a student in the office of the defendant at the time of the operation, and who was called in by him to witness it, and to assist to some extent while the operation was taking place, described, at the instance of the defend-

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ant, the circumstances and facts attending the operation, and she was asked: "What do you say as to the propriety or impropriety of performing this operation in this case of sterility?" To this question the plaintiff objected as incompetent, and also that the witness is not competent to express an opinion. The objection was sustained and the defendant excepted, and the witness then added: "I have read the books upon the subject of sterility, and the various remedies for it." She was then asked the following question: "What do you say from your reading and from observation of this operation and the other operations that you have seen, as to whether or not it was properly and carefully performed?" This was objected to by the plaintiff as incompetent; also, the witness is not competent to express an opinion. The objections were "sustained to the question in that form," and the defendant took an exception. It may be observed that the witness had been allowed carefully to describe all that she saw, or all that occurred in her presence, and whatever she heard of the conversations between the patient and the physician. The question last quoted was compound in its nature, and sought to have the witness compare the operation in question with "the other operations" that she had witnessed, and to determine therefrom "whether or not it was properly and carefully performed."

We think the remark of the trial judge was correct, when he said: "Objection sustained to the question in that form." In respect to both of the questions which we have seen were propounded to the witness Dresser, the trial judge was called upon to determine whether she was qualified to speak as an expert, and we are of the opinion that his conclusion was not erroneous. *Hurd v. Cook*, 75 N. Y. 454; *Clark v. Bruce*, 12 Hun, 271; *Same v. Same*, id. 274; *Whart. & S. Med. Jur.*, § 275.

Fourth.—After the defendant's evidence was in, the plaintiff recalled Dr. Van Dyn, and propounded to him the

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following question : " If, in the case supposed yesterday, the cervix was sufficiently large to receive this dilator without pressure exceeding an ounce, then what do you say as to the sufficiency of the cervix to perform all the purposes of nature ? " This question was objected to by defendant " as re-opening. " Thereupon the court remarked : " I don't remember that they went over that. I think it is competent, and not re-opening. " Thereupon the defendant took an exception and the witness answered, viz : " I should think that the mouth was open. " " I should think that it would be sufficiently open, so far as the size is concerned, for the processes of nature, if it would allow that in that way. " While the defendant had the case, he called several physicians to vindicate the operation performed by him, and he had, as a witness, minutely stated the condition in which he found the parts before operating and during his operation. To meet this evidence it was proper that the plaintiff should be allowed to take the opinion asked for in the question asked of Dr. Van Dyn, and the trial judge committed no error in allowing the question to be answered.

Fifth.—We have carefully read the charge of the trial judge, and we find the same is in accordance with the rules of law stated in the case to which we have already referred, and we think the defendant's five exceptions to the charge are unavailing. The questions of fact involved in the case were carefully, cautiously and elaborately submitted to the jury. We have looked at the other rulings to which our attention has been called by the learned counsel for the appellant, although no exceptions were taken, and we are of the opinion that no error was committed against the defendant in making the rulings during the progress of the trial. We have carefully considered the evidence on either side of the case, and while we are of the opinion that there is great strength in the testimony of the witnesses produced in behalf of the defendant, and while we might hesitate in decid-

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ing the main questions adverse to the defendant were they before us in the first instance, we are, however, of the opinion that, considering the conflict in the testimony found when reading that given in behalf of the plaintiff in connection with that offered in behalf of the defendant, and bearing in mind that under our system of jurisprudence controverted questions of fact are to be submitted to a jury, and their verdict accepted unless it is against the clear weight of the evidence, we are of the opinion that it is our duty, in obedience to the general rule applicable to verdicts, to sustain the one taken in this action.

Judgment and order affirmed, with costs.

All concur.

NOTE ON THE ADMISSIBILITY AND EFFECT OF THE WHOLE OF A STATEMENT IN EVIDENCE.

The rules of evidence permit a party, a part of whose admission or statement has been given in evidence on the examination of the adverse party, to introduce in evidence, if he desires, the remainder of such admission or statement, in order to explain, qualify or destroy the effect of the portion already admitted. It must, however, pertain to the same point and be relevant and material to the issues. The effect of such testimony after its admission, is, under the rules of law, a question for the jury.

Whole of the conversation.—Where the declarations of a party are proved against him, what he says in his own behalf at the same time is competent, but not conclusive, evidence in his favor. *Bears v. Copley*, 10 N. Y. 93.

A party, whose statement has been given in evidence against him by his opponent, has no right to prove all that he said at the same time, or in the same conversation, solely because such further or other statements were made at the same time or in the same conversation. *Rouse v. Whited*, 25 N. Y. 170.

Where part of a conversation has been given in evidence, any other or further part of the conversation may be given in evidence in reply, which will in any way explain or qualify the part first given in evidence, and there is no difference in this respect between statements made in conversation by a party to the suit and those made by a

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third party. All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and, therefore, the plainest principles of equity require that, if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use, should be shown and considered in connection with it. *Id.* In this case, where the plaintiff, to show that his property had been applied to the defendant's use, in payment of a note made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff and declared that it was the plaintiff's, the defendant was held to be entitled to prove his statement in the same conversation that the note was the plaintiff's debt and he was to pay it.

In *Misselbeck v. Greime*, 2 N. Y. S. C. 660, after a witness for plaintiff had testified to an admission by defendant, it was held to be proper to put to him on his cross-examination the question, "How much did defendant say he owed plaintiff at that time and in that conversation?" and that it did not conflict with the rule laid down in *Rouse v. Whited*, *ante*.

In an action for personal injuries, where the defendant gives evidence of the statements and declarations of the plaintiff in respect to the circumstances of the injury done, after the occurrence, the plaintiff will not be permitted to prove by another witness his own declarations relating to the same subject, not appearing to be a part of the conversation proved by the defendant. The admission of such independent declarations, though made not far from the time of those already in evidence, is erroneous. *Downs v. N. Y. Central R. R. Co.*, 47 N. Y. 83.

There is a limit to the extent to which a party may go in calling out what was said by and to him in a conversation, parts of which the other party has proven. *Platner v. Platner*, 78 N. Y. 90. The rule is that where part of a conversation has been given in evidence, any other or further part of that conversation which will in any way explain and qualify the part first given, may be given in evidence in reply. *Id.* *Prince v. Samo*, 7 Ad. & Ell. 627. In the latter case, the rule is applied only to the declarations of a party to the action, and so far it is approved in *Garvey v. Nicholson*, 24 Wend. 350, where it is held that where a party on the trial of a cause avails himself of an admission of his adversary to sustain his action or defense, the opposite party is entitled to prove such other parts of the conversation had on his part as tend to explain, modify or even destroy the admission made by him; but is not at liberty to call for such parts of the conversation had by him as relate to assertions operating in his favor made upon the general merits of the case, but having no connection with the ad-

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mission made. The rule is not limited to the admissions of a party, but will apply to the declarations of a third person. *Platner v. Platner*, *ante*; 1 Phil. on Ev. 415. In the last case cited, the plaintiff offered to show the whole conversation, not limiting the offer to what was said that would explain or qualify what had been proved by the defendant, and the offer was for this reason properly denied.

The introduction of a part of a writing in evidence by one party renders admissible, on the other side, so much of the remainder as tends to explain or qualify what has been received; and whatever rebuts or destroys the inference to be drawn from, or the use to be made of, the portion put in evidence, is to be deemed a qualification. *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274. This case was an action on an insurance policy, and to prove the falsity of an answer as given in the report of the medical examiner, the defendant put in evidence a portion of a letter written by the insured; and the plaintiff was properly permitted to read in evidence the remainder of the letter, which gave a history of the transaction, showing that the writer gave the correct answer and was ignorant of the fact that an untruthful answer was written in the report. The defendant, by reading a part of it in evidence, was bound to take with it all that explained or qualified what preceded. *Id.*

Where one party reads a part of a statement or writing, the opposite party may read so much of the remainder as tends to qualify or explain what has been received. *Parmenter v. Boston, H. T. & W. R. Co.*, 37 Hun, 354; *Rouse v. Whited*, *ante*; *Grattan v. Metropolitan Life Ins. Co.*, *ante*. But a party reading a part of a statement or correspondence cannot be compelled by his adversary to read it all. The other party can read it himself, if he wants it and it is material and competent within the rule above stated. *Parmenter v. Boston, H. T. & W. R. Co.*, *ante*.

In an action by a lessee for damages on the ground that his use of the demised premises was obstructed by the lessor, one of plaintiff's witnesses, upon cross-examination, testified that he attempted to negotiate with defendants a sale of plaintiff's business, and, on his redirect examination, was allowed to testify that, when plaintiff requested him to undertake the negotiation, he stated, as a reason for his desire to sell, that defendants had obstructed him and he could not compete with them. *Blumenthal v. Bloomingdale*, *ante*.

In an action of ejectment for certain lands claimed by the plaintiff to have been conveyed to her by a deed, which, after its delivery, was wrongfully taken and destroyed by the grantor, plaintiff's husband, after having testified, on his direct examination, to the fact that plaintiff exhibited the deed to him, testified, on cross-examination, that he asked her to see the deed, and was then allowed to state, on

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redirect examination, that before he asked to see the deed, and in the same conversation, plaintiff told him that she had a deed of the place, on the ground that it was merely explanatory of his statement on cross-examination. *Simmons v. Havens*, 101 N. Y. 427.

And where a party was called as a witness by the adverse party and was examined as to a transaction with a deceased person in reference to which he would have been precluded from testifying in his own behalf, it was held that he was entitled, upon his own examination, to explain his testimony, and to state the whole transaction. *Merritt v. Campbell*, 79 N. Y. 625.

Where one party proves an admission of the other party against him, the latter has a right to insist that the whole of the conversation be taken together, and he may prove all that was said at the time, as well what makes in his favor as what is against him, and the whole admission is presumably true until some part of it is impeached by evidence. *Citizens' Nat. Bk. v. Importers', etc.*, Nat. Bk., 44 Hun, 386; *Rouse v. Whited*, *ante*. This rule has no application to a case where one party proves an act, and not the admission of the adverse party; and though the latter may give in evidence his statement accompanying the act, such statement will not be taken, without evidence, as presumably true. *Citizens' Nat. Bk. v. Importers', etc.*, Nat. Bk., *ante*. In this case, a depositor sued a bank for not paying his check when his account was good, and proved the demand and refusal when the check was presented for payment. The court held that, though the defendant had a right to prove by the witness testifying to the demand and refusal the reason given for the refusal, there was no principle of law which justified the assumption, without evidence, that the reason given was true.

Effect.—Where a person was sued for a physician's bill, and admitted that the plaintiff had furnished the medicine, etc., charged in his account, but also said that she had not employed him, and was under the age of twenty-one years, it was held that the whole declaration must be taken together and would not authorize a judgment against the defendant. *Walling v. Toll*, 9 John. 141.

When a party relies upon the confession of his adversary for matter of charge, the latter is entitled to all that was said at the same time, on the same subject, by way of discharge. *Dorland v. Douglass*, 6 Barb. 451. The court and jury may give credit to what charges the party, and disbelieve matter said at the same time in avoidance, if the latter is improbable in itself, or is shaken by the other proofs in the case. *Id.* But, if the matter of avoidance relates to another subject not inquired about by the examining party, though relevant to the matter in issue, it is not admissible within this rule. The further conversation must not only relate to the matters in issue, but also to

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the fact called out by the other party. The latter, if he calls for the admissions of his adversary on a particular point, must take with it all that was said on that point. *Id.* In *Credit v. Brown*, 10 John. 365, where the plaintiff in trespass for killing his dog proved that the defendant confessed that he had shot the dog, that assaulted him on the main road, the admission and avoidance relate to the same subject, cannot be disjoined, and, when taken together, amount to a justification.

In *Smith v. Jones*, 15 John. 229, the only evidence of the sale, in assumption for goods sold, was the admission of the defendant united with a statement that he had paid for them. So, in *Carver v. Tracy*, 3 John. 427, the defendant admitted that he had received a dollar of the plaintiff, but said that it was his due. *Walling v. Toll*, *ante*, is to the same effect. In each of these cases the plaintiff was not permitted to recover, as there was no evidence with which to charge the defendant with the debt save his admission which was coupled with a declaration of payment or other discharge, and no other proof in the case. In them also the whole confession was made at the same time, and related to the same point of inquiry. But in *Dorland v. Douglass*, *ante*, the confession given in evidence by the defendant related to a note which was not in suit, and the plaintiff was not permitted to use in his own favor a declaration made by himself, at the same time, but concerning the note sued upon, on the ground that the matter thus proposed to be shown had no connection with the answer to the question originally put to the plaintiff, nor tended in any manner to qualify or limit it.

The whole confession of a party, when resorted to as evidence against him, must be taken together, though it does not follow that all is entitled to credit. *Pierce v. Delamater*, 3 How. 162. The part of the confession which, it is claimed, makes against the party calling it out, must be full and certain; in fact, enough to constitute a defense if proved by other testimony. *Id.* In this case, defendant admitted the correctness of an account that was shown him, but at the same time said that he had an off-set, and it was held that plaintiff's case was made out and defendant was bound to prove his set-off on the trial.

The general rule is, that where the admission of a party is resorted to as evidence against him, he is at liberty to call out the whole conversation of which the admission was a part. But the additional conversation must be relevant to the matter in issue, and must relate to the point or fact called for on the part of his antagonist by questions on his side. *Garvey v. Nicholson*, 24 Wend. 351; *Prince v. Samo*, 7 A. & Ell. 627; *Kelsey v. Bush*, 2 Hill, 440. But, if the part of the admission, which goes to discharge the party making it, is highly improbable, or there is some evidence allunde, though but slight, tending to

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discredit it, the jury may reject it and give effect to the other part. *Kelsey v. Bush, ante*. Where, however, there is nothing improbable or suspicious in that part of the admission which goes to discharge the party, and the other evidence in the cause tends to confirm its truth, the party should be allowed the benefit of the whole admission taken together. *Id*.

In *Penfield v. Jacobs*, 21 Barb. 335, the court held that a cause of action may be established by proof of the defendant's admissions, where the justice or jury believe those that make against him, and disbelieve those that make in his favor, when the latter are inconsistent and contradictory.

A party whose admission is introduced in evidence against him, has a right to have all he said upon the subject at the time taken and considered together. *Barnes v. Allen*, 1 Abb. Ap. Dec. 111. He has a right to the benefit of the portion which tends to excuse or justify the act; and if the whole statement taken together does not make out a cause of action, the action must fail if there is no other evidence to support it. *Id*. *Credit v. Brown, ante*; *Smith v. Jones, ante*. And, though the jury are not necessarily bound to give equal credit to all parts of the statement, it is not proper to instruct them, in effect, that they may arbitrarily believe the fact admitted, and disbelieve the reason for it. *Barnes v. Allen, ante*.

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THE BOARD OF HEALTH of the TOWN OF KORTRIGHT, Appellant, v. STEPHEN CEASE, Respondent.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1888.

Boards of health. Laws of 1885, Chap. 270.—The boards of health in the several towns of this State were continued in existence by Chap. 270 of Laws of 1885, and can exercise the powers and are subject to the duties specified in section 3 of said act, until their successors shall be elected as therein provided.

Motion for a new trial on case and exceptions ordered to be heard in the first instance at the general term. The action was brought to recover \$100, the amount of a fine imposed upon the defendant by the plaintiff for creating a nuisance in the town of Kortright, and violating the plaintiff's health regulations. On the trial the plaintiff offered to prove that it was duly organized upon the 14th day of February, 1885, and its proceedings which resulted in the imposition of such fine. The court excluded all the evidence offered by the plaintiff to establish the allegations of its complaint, and then granted the defendant's motion for a nonsuit.

F. N. Gilbert, for plaintiff.

Wm. H. Johnson, for defendant.

MARTIN, J.—The nonsuit was granted and the plaintiff's evidence excluded, on the sole ground that the plaintiff had no legal existence, and consequently could not maintain this action. The trial court held, that although the plaintiff was duly constituted under the law as it stood at the time of the passage of chapter 270 of the laws of 1885, yet, as that statute repealed the former statutes, the plaintiff's legal ex-

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istence was terminated. That the former statutes were repealed, and the powers of the then existing boards of health were terminated, unless preserved by some saving clause contained in the statute of 1885, must be admitted. Hence it becomes necessary to examine this statute and determine whether it contains any provision which preserved the existence and continued the powers of boards of health in towns until their successors were elected in pursuance of its provisions.

The first section of the statute under consideration provides for the appointment of boards of health in the cities and incorporated villages of the state, and then provides that "this section shall not be construed to remove any of the existing boards of health in any of the cities or villages of this state, but the successors of such boards shall be appointed as in this section provided."

Section 2 provides that "It shall be the duty of the supervisor, the justices of the peace and the town clerk, in each town in this state to meet in their respective towns within thirty days from the date of the town election in each year, and elect a citizen of such town of full age, who, with them, shall constitute the board of health for such town for one year, or until their successors are chosen." It also provides for the appointment of a health officer and for the filling of any vacancy in the board of health of any city, village or town when occasioned by the death, resignation, inability to act, or removal of any member. But this section neither contains a provision like that above quoted as to existing boards of health in cities or villages, nor does it provide for the appointment or election of boards of health in towns after the passage of that statute and before the next town election to be held in such town.

Then follows section 3, which declares, "The several boards of health *now organized in any city, village or town in this state* (except the cities of New York, Brooklyn and Buffalo), and the several boards of health constituted under

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this act shall have power, and it shall be their duty," to perform the acts, and impose upon others the duties and liabilities which are therein specified, and which include the acts, duties and liabilities in the complaint alleged to have been performed by the plaintiff and imposed upon the defendant.

The defendant contends, that the fact that the statute provides in express terms that section 1 shall not be construed to remove any of the existing boards of health in any of the cities or villages of the state and does not contain such a provision as to boards of health in towns, is controlling evidence of an intent to abolish the boards of health in the various towns of the state, although the office would remain vacant until the succeeding town election, when boards might be constituted under the provisions of that statute. We cannot think that such was the intention of the statute. Such a result could not have been intended.

Effect is to be given to the provisions of section 3, which provide that the several boards of health "*now organized in any * * * town of this state*" shall have power, and it shall be their duty to perform the acts therein specified, as it is not to be presumed that the legislature intended any part of the statute to be without meaning. That which is implied in a statute is as much a part of it as what is expressed. It will not do to say that this provision was accidentally or unintentionally inserted in the statute, as courts cannot correct supposed errors, omission or excesses of the legislature. *Waller v. Harris*, 20 Wend. 562; *McCluskey v. Cromwell*, 11 N. Y. 593, 602.

If this portion of the statute is interpreted according to the most natural and obvious import of the language employed, it becomes manifest that it was intended to continue boards of health then organized in the several towns of the state until their successors were elected, and to confer upon them the powers, and impose upon them the duties, specified in section 3 of that act. That such was the

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purpose of the statute is evinced by, or to be clearly implied from, the language employed. To construe it otherwise would be to elude, rather than to enforce, it.

But it is said that the case of *Hughson v. The City of Rochester* (17 N. Y. State Rep. 289 ; 49 Hun, 45) is in conflict with this conclusion. We do not think so. While the learned judge who delivered the opinion in that case took occasion to state in his opinion that the repealing act contained in the statute of 1885 abolished all boards of health existing in towns before the passage of that act, yet it will be seen that he was careful to remark that it was not necessary to go so far in order to obtain the result reached in that case. All that the court decided was that the plaintiff should have been nonsuited on the sole ground that the statute under which the action was brought had been repealed. It was not held that the plaintiff's existence as a board of health had terminated. An examination of the opinion in that case discloses that the court did not in fact pass upon that question. Nor was the determination of the question necessary to a decision of that case.

Notwithstanding the dictum in that case, still we are of the opinion that it was the intent and purpose of the statute to continue the existence of the boards of health in the several towns of this state, and to impose upon them the duties and confer upon them the powers specified in section 3 of that act until their successors should be elected as therein provided. We think the learned trial court erred in holding that the plaintiff's existence as such board was terminated and in nonsuiting the plaintiff. It follows that a new trial should be granted.

New trial granted, with costs to abide the event.

HARDIN, P. J., and MERWIN, J., concur.

HENRI M. BRAEM *et al.*, Appellants, v. THE MERCHANTS'
NATIONAL BANK OF SYRACUSE, Respondent.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Corporation. Offer of judgment.*—An offer of judgment made by a corporation in contemplation of insolvency, or with the view to giving the plaintiff a fraudulent preference, falls within the prohibition of the statute, and is void as to its creditors.
2. *Same.*—But in case there is an agreement between the company and plaintiff to give him security for an existing debt on demand, and the judgment is given in compliance with such agreement, the fact of the corporation's insolvency at the time does not furnish controlling evidence that such offer of judgment was made in contemplation of insolvency, and the question is one of fact for the jury.
3. *Same. Remedy of creditor.*—A judgment creditor cannot maintain an action at law against another judgment creditor for damages for issuing an execution upon his judgment before the former had any interest in the property, nor for afterwards receiving from the sheriff the amount of such judgment, though the judgment would have been held invalid and set aside in a proper action or proceeding for that purpose.

Appeal from a judgment in favor of defendant for costs, and from a decision at the circuit nonsuiting the plaintiffs and dismissing their complaint.

This was an action at law, to recover damages which the plaintiffs claim to have sustained by the wrongful acts of the defendant. The plaintiffs were copartners. The defendant was a corporation duly organized under the laws of the United States. The Syracuse Iron Works was a corporation duly organized under the general manufacturing laws of the state, and doing business at the city of Syracuse.

October 7, 1884, the plaintiffs recovered a judgment against the Syracuse Iron Works for \$1,798,38, in the city

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court of the city of New York. On the 8th day of October, at nine o'clock A. M., a transcript of such judgment was duly filed in the office of the clerk of Onondaga county. At half-past nine o'clock on the same day, an execution was duly issued thereon to the sheriff of Onondaga county.

On the 7th day of October, 1884, the defendant commenced an action against the Syracuse Iron Works upon three notes amounting to \$15,000.

On the same day the Syracuse Iron Works, by its attorneys, offered judgment for the amount of such claim, with costs. The offer was accepted by the defendant, and judgment was entered thereon in the office of the clerk of Onondaga county on that day for \$15,073.31. An execution was immediately issued thereon to the sheriff of Onondaga county, who levied upon the goods and chattels belonging to the Syracuse Iron Works.

On the same day, and before the entry of the defendant's judgment, one Mary E. Gere obtained judgment against the Syracuse Iron Works, and issued an execution thereon to said sheriff under which said sheriff first levied on such goods and chattels. The property levied upon by said sheriff was sold on the 14th day of October, 1884. The sheriff realized upon the sale an amount sufficient to pay the judgment in the action brought by Mary E. Gere, and \$13,671.86 upon the judgment entered in the action brought by the defendant.

In July, 1884, an action was commenced by R. Nelson Gere against the Syracuse Iron Works and judgment was duly entered therein on the 7th day of October, 1884, and execution issued thereon after the executions in the case of Mary E. Gere, and of the defendant, were issued. The execution of the R. Nelson Gere action was returned by the sheriff wholly unsatisfied, and thereupon, and upon the same day, R. Nelson Gere commenced an action against the said iron works for the sequestration of its property and for the appointment of a receiver. The defendant appeared by its

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attorney and admitted service of a notice of motion for the appointment of a temporary receiver on the same day at six o'clock P. M., and at that time an order was made appointing Charles E. Hubbell as temporary receiver of said corporation, but no notice of the application for such appointment was served upon the attorney-general. On October 8th the temporary receiver thus appointed made and filed his bond.

On December 9, 1884, and before the commencement of this action, a permanent receiver of the property of said iron works was duly appointed in said action upon notice to the attorney-general. On the trial the proof tended to show that there was personal property of the value of \$2,000, consisting of tools, etc., which belonged to said iron works and was not levied upon by said sheriff. The Syracuse Iron Works was insolvent on October 7, 1884. On the trial the court held that this action could not be maintained, and nonsuited the plaintiffs.

Wm. C. Holbrook, for appellants.

W. G. Tracy, for respondent.

MARTIN, J.—The plaintiffs claim that as the Syracuse Iron Works was insolvent at the time of the offer by that company to allow judgment to be taken against it in favor of the defendant, the judgment was void, as being in contravention of the statute which declares: "It shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer and assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void." 1 R. S., part 1 chap. 18, title 4, § 4, 8th ed. p. 1729, § 4.

If the offer of judgment was made in contemplation of insolvency, or with the view to giving the defendant a fraudulent preference, then it would fall within the pro-

hibition of the statute and would be void as to the creditors of such corporation. *Kingsley v. The First National Bank of Bath*, 81 Hun, 329.

If, however, as the evidence tends to show, there was an existing agreement between the defendant and such company that the company should give the defendant security for the debt which was owing by it to the defendant whenever the defendant should demand it, and this judgment was given in pursuance and execution of such agreement, then the fact that the corporation was insolvent at the time would not furnish controlling evidence that such offer of judgment was made in contemplation of insolvency. *Paulding v. The Chrome Steel Co.*, 94 N. Y. 334.

The question whether the offer of judgment was made in contemplation of insolvency was a question of fact for the jury, and should have been submitted to them unless there were other reasons why this action could not be maintained. Therefore, for the purpose of examining the other questions in this case, it must be assumed that the question would have been determined in the plaintiffs' favor.

The plaintiffs also claim that as the judgment recovered by the defendant was void, they can maintain an action at law for the damages they claim to have sustained by the alleged wrongful act of the defendant in issuing an execution against the property of such corporation upon a void judgment.

The iron works was actually indebted to the defendant to the amount claimed, and an action was commenced to collect such debt. The company admitted that the sum claimed was due, and offered judgment therefor. The defendant accepted such offer, and entered judgment thereon for the amount offered. Execution was then issued thereon and delivered to the sheriff of Onondaga county. The sheriff levied upon the property of the iron works, sold it, and paid the amount of an execution under which a previous levy had been made, and the remainder of the proceeds of such

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sale was applied upon the execution issued upon the defendant's judgment. When the defendant's judgment was entered, the execution issued thereon, and a levy made under it, the plaintiffs had acquired no lien upon or interest in the property sold. No transcript of their judgment had then been filed or docketed in Onondaga county. The defendant performed no act after the plaintiff's judgment was docketed in Onondaga county which in any way interfered with the rights of the plaintiffs. It is true it received certain moneys from the sheriff to apply on its judgment, but in so doing, it in no way interfered with or impaired any right which the plaintiffs had acquired. The act of which the plaintiffs complain, and for which this action was brought was performed on the day previous to the docketing of their judgment in that county.

The weakness of the plaintiffs' claim seems to rest in the fact that at the time of the issuing of defendant's execution, and the levy by the sheriff, the plaintiffs had obtained no lien upon or interest in the property in question. The plaintiffs had acquired no legal right which was invaded by the act complained of. A right of action to enforce a merely moral or imperfect obligation does not exist. *Ashley v. Dixon*, 48 N. Y. 430, 432.

An act which does not amount to a legal injury cannot be actionable, even if done with a bad intent. *Stevenson v. Newnham*, 13 C. B. 285.

It is essential to an action of tort that the action complained of should be legally wrongful as regarding the party complaining; *i. e.*, it must prejudicially affect him in some legal right. The fact that it will, however, directly do him harm in his interests is not enough. *Rogers v. Rajendro Dutt*, 13 Moore, P. C. 209; 8 Moore, I. A. 103; 9 W. R. 149.

A plaintiff who has procured an execution to be levied upon personal property of a defendant cannot sustain an action against a wrongdoer for taking such property out of

the possession of the officer. *Barker v. Mathews*, 1 Den. 335; *Ansonia Brass and Copper Co. v. Pratt*, 10 Hun, 443; *Skinner v. Stuart*, 39 Barb. 206; *Steffin v. Lockwood*, 17 Week. Dig. 418.

In *Adler v. Fenton* (24 How. U. S. 407), where a creditor, whose debt was not yet due at the time of bringing the action, brought a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently so as to hinder and defeat the creditors in the collection of their lawful demands, it was held that the action would not lie.

In *Moran v. Dawes* (Hopkins' Ch. 365), it was held that the court had no jurisdiction to restrain a defendant in a suit at law, after verdict against him and before judgment, from alienating his property. In delivering the opinion in that case the chancellor says :

"It suffices for the determination of this question that, by our law, the complainant has no lien or rights in the lands of the defendant; that the defendant may, notwithstanding the pendency of the suit against him, sell his lands; and that equity does not vary these legal rights."

In *Hutchins v. Hutchins* (7 Hill, 104), where the defendants, after a will had been made and executed devising certain real estate to A., conspired with each other to induce the testator to revoke it, and effected their object by means of false and fraudulent representations, it was held that A. could not maintain an action, as the revocation of the will merely deprived him of an expected gratuity, without interfering with any of his rights.

In *Murtha v. Curley* (47 N. Y. Supr. [15 J. & S.], 393), it was held that an action for damages only cannot be maintained upon proof that defendant conspired with plaintiff's judgment debtor to defraud plaintiff of his debt, by taking and foreclosing a fraudulent chattel mortgage upon the debtor's property and selling the property covered thereby, before the issue of execution on such judgment. It must

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appear that plaintiff had, at the time of the alleged wrongful acts, some interest in, or lien upon the property, which could be the subject of damage. It seems that the proper action in such cases is in the nature of a creditor's bill to set aside the mortgage, and that the judgment therein should direct that defendant account for the property mortgaged, or its proceeds.

In *Wellington v. Small* (3 Cush. 145), in an action on the case, brought against two defendants, it was alleged that one of them was indebted to the plaintiff; that the two confederated and conspired together to prevent the plaintiff from obtaining security for or payment of his debt; that in pursuance of such purpose and intention, and in order to enable the plaintiff's debtor to take the poor debtor's oath, the defendants caused the property of the latter to be removed from his own custody and possession into the possession of the other defendant, by whom the same or the proceeds thereof were kept secreted and concealed from attachment; that the plaintiff sued out a writ against his debtor to recover the debt aforesaid, and caused his body to be arrested thereon; that the defendant in the said suit took the poor debtor's oath and was discharged from arrest; and that the plaintiff entered the same and recovered a judgment therein which remained wholly unpaid. The plaintiff at the trial gave evidence of everything alleged in the declaration, except the fact of conspiracy, of which there was no direct proof. It was held that the action could not be maintained.

In *Randall v. Hazelton* (12 Allen, 412), where a mortgagee of land voluntarily promised the mortgagor not to act under a power of sale contained in the mortgage without notice to him, but was afterwards induced by falsehood to assign the mortgage to persons, who thereupon proceeded to sell the land, under the power of sale, without notice to the mortgagor and clandestinely, whereby the latter was deprived of his equity of redemption, it was held

that he could maintain no action at law against the parties guilty of the fraud.

In *Lamb v. Stone* (11 Pick. 527), which was an action on the case for the fraud of the defendant in purchasing personal property of the plaintiff's debtor and aiding the debtor to abscond, in order to prevent the plaintiff from enforcing payment of his debt by attaching the property or arresting the body of the debtor, it was held that the action could not be sustained, but that the proper remedy was either to attach specifically the property fraudulently transferred or to attach it in the defendant's hands by the trustee process.

In *Bradley v. Fuller* (118 Mass. 239), it was held that if a person who has a claim against a corporation, which he intends to enforce by an attachment of its property, is induced by the false and fraudulent representations of its treasurer to refrain from making the attachment, and all the property of the corporation is subsequently attached for the debt of another person, and is sold on execution, an action of tort for such fraudulent representations will not lie against the treasurer.

In *Brown v. London*, TWISDEN, J., said: "I remember an action upon the case was brought, for that the defendant had taken away his goods and hidden them in such secret places that the plaintiff could not come at them to take them in execution; and it was adjudged it would not lie." 1 Mod. 286.

In *Platt v. Potts* (13 Ired. 455), where a creditor had placed a note in the hands of an officer for collection, and another, by persuasion, induced the officer not to collect, and the debtor not to pay, the debt, it was held that the creditor had no ground for an action on the case against the other parties.

In *Matthews v. Pass* (19 Ga. 141), where a person aided a debtor to remove himself and his property out of the

state, held that an action on the case would not lie against such person at the suit of the creditor.

In *Kelly v. McCaw* (29 Ala. 227), it was held that an action would not lie to recover damages for the defendant's fraudulent and wrongful act in inducing the sheriff to release and discharge from his possession certain property on which an execution had been levied in favor of the plaintiff against a third person, and which defendant removed so that it could not afterwards be found, the defendant in the execution being insolvent, and having no other property out of which said execution could be satisfied.

The cases cited by the plaintiffs are distinguishable from the case at bar, and fall far short of sustaining the doctrine contended for by them. In *Yates v. Joyce* (11 John. 136) the plaintiff had a judgment, which was a *lien* on the property removed. In *Brown v. Feeter* (7 Wend. 301) the plaintiff *owned* the property taken by the direction of the defendant. In *Van Pelt v. McGraw* (4 N. Y. 110) the plaintiff's mortgage was a *lien* on the property removed, and the waste committed was a direct injury to such lien. In *Kerr v. Mount* (28 N. Y. 659) the defendant's testator caused the *property of the plaintiff* to be taken on an irregular attachment. The case of *Quinby v. Strauss* (90 N. Y. 664) is so meagerly reported that it is impossible to determine what was decided in that case. There are expressions in the portion of the opinion quoted which might perhaps be construed as being somewhat in conflict with some of the cases above cited, but we are unable to discover that any principle is established by that case which would uphold a recovery in the case at bar.

While it may be that the plaintiffs might have maintained a suit in equity to set aside the defendant's judgment and in aid of their execution while in the hands of the sheriff, or might by motion have compelled the sheriff to apply the money in his hands so far as necessary to the payment of their judgment, still, following the principle of the authorities

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cited, we are of the opinion that they could not maintain an action at law against the defendant for damages for issuing an execution upon its judgment before they had any interest in the property sold, nor for afterwards receiving from the sheriff the amount of its judgment, although it should be conceded that the defendant's judgment would have been held invalid and set aside as against them in a proper action or proceeding for that purpose.

We think the learned trial justice properly nonsuited the plaintiffs, and that the judgment appealed from should be affirmed.

Judgment affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concur.

CHARLES CLEVELAND, Respondent, v. NEW JERSEY STEAM-
BOAT COMPANY, Appellant.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Witness. Credibility.*—The fact that some contradictions are found in the testimony of the plaintiff as a witness on the present trial, when compared with his testimony on the former trial, would not have warranted the trial court in ruling, as a matter of law, that he was not entitled to credit; but the question was properly confided to the jury, with proper instructions, for them to determine, from all the circumstances before them, upon the evidence tending to corroborate the plaintiff, whether or no the position taken by him on the trial was in accordance with the truth.
2. *Verdict. When not set aside.*—The circumstance that the appellant's witnesses on a certain point outnumbered the witnesses of the respondent on the same point, does not furnish an occasion for disturbing the verdict.
3. *Witness. Credibility. When question for the jury.*—Where witnesses, who are called on behalf of a party, are in his employ and more or less interested in the question involved, what credence shall be given to them is a question for the jury to determine.

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4. *Damages. When a question for the jury.*—Where the testimony raises the question as to the extent, nature and permanency of plaintiff's injuries, what is a suitable sum to compensate him for such injuries is a question of fact, to be fairly and cautiously submitted to the jury.
5. *Evidence. Earnings.*—Under an averment in the complaint, in an action to recover for personal injuries received though defendant's negligence, that plaintiff has been, and will be, for a long time to come, unable to labor, etc., the amount of wages he was earning at the time of his injuries, and the fact that he had not been able to labor thereafter, are properly received in evidence.

Action to recover for the alleged negligence of the defendant, a common carrier of passengers, causing injuries to the plaintiff while a passenger on one of defendant's boats, just as it was about to leave the harbor in New York City for the city of Albany.

Appeal from a judgment entered on a verdict, and from an order denying a motion for a new trial.

R. K. & W. P. Prentice, for appellant.

Edwin H. Risley, for respondent.

HARDIN, P. J.—When the last appeal was before us (7 N. Y. State Rep. 598), in the course of our opinion we said: "We are, therefore, of the opinion that it was a question of fact for the jury to determine whether the gangway gate had actually been placed within its sockets before the person referred to escaped from the boat, and before the rush of passengers to the side in response to the exclamation, 'man overboard,' the difficulty which a person would encounter in lifting the gate out of its place, the fact that it was taken out of the water unbroken bore quite significantly upon the question of whether the position of the plaintiff taken upon the trial that the gate had not been placed in its proper position was true and reliable. To

solve that question, the principal question of the fact, we think, was the province of the jury.

If the defendant's boat started without the gangway gate being set, the defendant omitted to provide in time against one of the dangers to be guarded against by the use of such a gate."

Upon the trial now under review there was a conflict in the evidence upon the question stated in the foregoing extract from our former opinion. The trial judge carefully and cautiously submitted the question of fact to the jury. The counsel for the defendant seems to be of the opinion that because there was some contradictions in the testimony of the plaintiff, as a witness, found in comparing his testimony on the present trial with that given on the former trial, that the court ought to have ruled as a matter of law that the jury might not give credit to the plaintiff as a witness. We think his position is unsound. We think the trial judge properly confided the question to the jury, with proper instructions, allowing them to determine, from all the circumstances before them, upon the evidence tending to corroborate the plaintiff, whether or no the position taken by him on this trial was in accordance with the truth.

Several witnesses were called in behalf of the defendant to prove that the gate was in position. According to well-recognized precedents the circumstance that the defendant's witnesses on that subject outnumbered the witnesses of the plaintiff upon the same subject, does not furnish an occasion to disturb the verdict.

In *Wright v. Saunders* (65 Barb. 214), it was said, viz. "Although four witnesses against one is a very great preponderance, yet it was the right of the referee to believe the one and disbelieve the four. He saw and heard them, and he is much better able to determine the amount of credit to which they were respectively entitled than we can be." That case was affirmed by the court of appeals, and is reported in 2 Keyes, 323, and 36 How. Pr. Rep. 136.

Besides several of the witnesses who were called for the defendant were in its employ and more or less interested in the question involved. What credence should be given to them was for the jury to determine.

In *Elwood v. The Western Union Telegraph Co.* (45 N. Y. 554), in referring to witnesses, somewhat similarly situated, RAPALLO, J., said: "The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. * * * Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their evidence and to require that the jury should pass upon the weight to be given to their statements."

See, also, *Cushman v. U. S. Life Ins.*, 70 N. Y. 77; *Gildersleeve v. Landon*, 73 id. 609; *Khoeler v. Alder*, 78 id. 287; *Longyear v. U. S. Life Ins. Co.*, 20 Weekly Dig. 165; *Michigan Carbon Works v. Schad*, 38 Hun, 71.

We think the trial judge was justified in submitting the questions of the fact to the jury, viz.:

First. Whether the defendant was guilty of negligence causing the injuries complained of, and

Second. Whether the plaintiff was free from contributory negligence on the occasion of receiving the injuries.

Third. The question of damages was fairly submitted to the jury. The plainaiff testified quite freely as to the circumstances attending his injuries and the extent of suffering caused thereby. Several physicians were called in respect to his physical condition, and their testimony raised the question as to the extent and nature and permanency of the injuries he had received.

Dr. Hunt prescribed for him shortly after the injuries were received, and he states that he found: "That the disease was of a nervous character, and he was troubled with rheumatism at that time. He had a rheumatic affection of the intercostal muscles, and also in the limbs and in the ankle joints. I prescribed for him about two months. * * * I attributed his condition, which I have described, to a cold caught in some way or another. I questioned him as to the manner in which he was liable to take cold, and he told me of the accident that occurred, and I told him that I did not know of any other way it would take place except it was from that. I attributed it to that. It is a pretty hard matter to state what are his chances of recovery from this trouble that he has been afflicted with. I don't think he will entirely recover from it. Possibly he might. The pricking sensation in the leg and arm, and the pain about the region of the heart indicate the want of a good free circulation. It might indicate a disease of the nerves of a nervous character." See fol. 152.

Dr. Hopkins, in describing the difficulty, says, viz.: "It was an irritation of the nervous centers, as I diagnosed his case, from this sciatica, extending down through the nerves of the lower limbs, the full extent. At times he must have suffered, I should think, severely. * * * I cannot say he is any better from the time I first saw him, he could not get any benefit from the treatment." Fol. 164.

His wife was called as a witness, and she testified to his having fainting spells and being nervous, and adds, viz.: "He would jump out of bed and cry out 'I am drowning;' he would walk the floor at night complaining of pain. Prior to the injury he was healthy." Fol. 161.

Considerable other evidence was given in respect to the injuries and the effects thereof upon the physical constitution of the plaintiff. What was a suitable sum to compensate the plaintiff for such injuries was cautiously submitted to the jury, and was a question of fact, and we see nothing in the evidence which warrants us in disturbing the verdict

on the question of damages. *Hickinbottom v. D. L. and W. R. R. Co.*, 15 N. Y. State Rep. 13, and cases cited; *Leeds v. Metropolitan Gas-Light Co.*, 90 N. Y. 26; *Staal v. The Grand Street and Newtown Railroad Co.*, 107 id. 625; 11 N. Y. State Rep. 352.

In the course of the plaintiff's examination he testified what wages he was able to earn before he received the injuries, and he added, viz.: "My physical condition has not been such since this accident that I could resume my chosen occupation. I have not worked at it since I left it." The defendant took an exception to the admission of the testimony which we have just quoted. We think the same was permissible.

Our attention is called to *Butler v. Kent* (19 John. 223). That was an action against an officer for misbehavior in his office, and it was held in that case that recovery could only be had for special damages, and they must be "particularly stated in the declaration." We see nothing in that case which warrants the contention of the defendant, that the admission of the evidence which we have referred to was improper.

In the complaint the plaintiff avers that since the injuries received, he "has been, and for a long time to come, will be, unable to labor, and has been subjected to great expense in consequence of the premises, and otherwise injured to his damage in the sum of \$5,000."

We think, under that averment, the amount of wages he was earning at the time of his injuries, and the fact that he had not been able to labor thereafter, were properly received, and that there is no force in the exceptions taken to that evidence.

These views, as well as those expressed by us when the case was last before us, in the opinion reported in 7 N. Y. State Rep. 568, lead us to sustain the order and verdict.

Judgment and order affirmed, with costs.

MARTIN and MERWIN, JJ., concur.

JACOB DEACH, Respondent, v. WILLIAM H. PERRY,
Appellant.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Referee. Question of fact.*—Where a fair question of fact, upon conflicting evidence, is presented for the consideration of a referee, and his finding of fact is not contrary to the weight of the evidence, the general term will accept his finding of fact.
2. *Assignment. When sufficient.*—An assignment, which recites the transfer and consideration in general terms, is sufficient to carry the claim to the assignee, even though no actual consideration was paid therefor by him to the assignor; the legal title is sufficient to enable him to maintain an action.
3. *Same. Payment to assignor before notice.*—A payment of an assigned claim by the debtor to the assignor, without any knowledge that the claim had been assigned, is valid.

Appeal from a judgment entered upon the report of a referee.

The case contains all the evidence. (Fols. 5 and 124.)

H. Clay Hall, for appellant.

Willard Rinkle, for respondent.

HARDIN, P. J.—Appellant's first point is, that the referee erred in finding "That the several accounts (mentioned in the second count of the complaint), and each of them, were duly assigned by written instruments to the plaintiff before the commencement of this action," and his argument is, that there is no sufficient evidence that the accounts, or any of them, were assigned before the commencement of the action.

First. The complaint contains the positive averment that the accounts were assigned before the commencement of the action.

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The answer contains only a denial of knowledge or information sufficient to form a belief as to whether or not the persons named in the second subdivision of the plaintiff's complaint ever sold or assigned the claims therein to the plaintiff. It contains no affirmative defence on the subject of the ownership of the claims.

Upon the trial, plaintiff produced written assignments, marked exhibits 2 to 9 inclusive, which purported to be executed by the several persons referred to in the complaint. These several assignments bear date November 2, 1887. Presumptively, the assignments were executed on the day they bear date.

The plaintiff testified that Mehl, Wilbert, Herrig, Simon Deach, William Nuffer, Albert Hoeglin, George Seifert, Fred Seifert, Adam Horn, Henry Fike and William Herrig worked for the defendant loading a boat load of ice. He also testified, viz.: "I saw Wilbert sign his name to it" (referring to exhibit 2), which was then offered in evidence, and follows:

"WILLIAM PERRY, to HERMAN WILBERT, Dr.

"1887.

"To ten hours' work, at 15 cts. \$1.50

"For value received, I hereby sell, assign and transfer the foregoing account to Jacob Deach.

"Dated Nov. 2, 1887.

"HERMAN WILBERT."

The other assignments embracing the exhibits from 2 to 9 inclusive were like the one which has just been given *mutatis mutandis*. The witness continued, viz.: "The assignments were not two days apart; I returned them to you (Mr. Rinckle) the next day after they were all assigned; they were signed long before the commencement of this action; a month before." Folio 25.)

In the course of the cross-examination, he stated on referring to the exhibits 2 to 9, inclusive, "These assignments were signed the same day he gave them to me; about the tenth or fifteenth of November these papers were signed; Christian Herrig signed the last one in his own house; had only Christian's with me; the rest were at my house."

The plaintiff on being re-called as a witness, testified, viz.: "The day after November election I came down and got those assignments and they were signed same night and next day."

Inasmuch as election day was the 9th of November, 1887, it is apparent that the testimony of the plaintiff was somewhat inaccurate and vague, if not intentionally false, as to the date when the assignments were executed. It appears from his evidence that he is unable to read writing (case, fol. 45); however, there is some other evidence found in the appeal book which bears upon the question when the assignments were executed. Mr. Rinkle, the attorney for the plaintiff, was called as a witness, and, after testifying that the action was commenced by the service of a summons on November 11, 1887, he adds (fol. 53): "These assignments of the causes of action (being exhibits 2 to 9 inclusive), in second count of complaint, were returned to me about a week before the commencement of that action as they are now. I showed them to Mr. Perry on the day the summons was served." This evidence is very pointed and important and apparently sustains the date mentioned in the assignments as the one when they were executed. However, in considering this evidence it is important to bear in mind that the defendant when upon the stand as a witness, testified, viz.: "I remember coming in your (Mr. Rinkle's) office before the suit was brought; I came in the day the summons was served; to my knowledge you did not show me those assignments; you might have said all the accounts were assigned to Mr. Jacob Deach; the day the summons was served I did not see those papers

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(exhibits 2, 3, 4, etc.); you did not, to my knowledge, say 'here are the accounts;' you told me, on several occasions afterward, that the accounts were all assigned to Mr. Deach."

Upon the evidence which we have referred to, we think a fair question of fact for the consideration of the referee was presented as to when the assignments were executed, whether before or after the commencement of the action. The referee has found that they were assigned before the action was commenced. A careful inspection of the evidence has not led us to the conclusion that the referee committed an error, or that his findings were contrary to the weight of the evidence. He saw the witnesses, heard their testimony, and was quite as well capable of determining where the truth was in respect to the date of the execution of the assignments, as judges can be in reading the testimony found in the appeal book. We must therefore accept his finding of fact, and hold that the appellants' first point is unavailing.

Second. We think the form of the assignments entirely sufficient to carry the respective accounts to the plaintiff. Whether they were made for an actual consideration paid by the plaintiff to the assignors is not important; it is sufficient that the plaintiff had the legal title to the accounts at the time of the commencement of the action. A payment to the plaintiff would discharge the defendant; a recovery by the plaintiff, and a payment of the recovery by the defendant would discharge his liability. They were claims which might be transferred. Code Civ. Pro., § 1910.

In *Hays v. Hathorn* (74 N. Y. 486), in addition to the denial of the transfer of the note and also a denial that the plaintiff was the legal holder and owner thereof, or was the real party in the suit, it was alleged that the note was transferred to another, who was owner and holder, and the real party in interest, and it was held that a production of the instrument was *prima facie* evidence of the plaintiff's

iff's title, although it was said the defendants had a right to offer evidence to rebut that presumption. The case is quite unlike the one before us. This case is more like *Allen v. Brown* (44 N. Y. 228), where it was held that as against the plaintiff holding legal title to the claim by written assignment valid "upon its face," the debtor cannot raise the question as to "the consideration for such assignment, or the equities between the assignor and assignee." That case was referred to with approval by HAND, J., in *Hays v. Hathorn* (*supra*).

In *Eaton v. Alger* (47 N. Y. 345), it was held that where a note had been delivered to the plaintiff "upon his undertaking to collect at his own expense," and to pay to such person upon its collection, a certain sum of money, that the party was the real party in interest; and in *Sheridan v. Mayor* (68 N. Y. 30), it was held that "the plaintiff, holding the written assignment of the claim to himself valid on its face, obtained the legal title and was the real party in interest, notwithstanding the fact that the assignment was without consideration and merely colorable as between him and the original claimant."

In referring to that case Judge HAND says, in *Hays v. Hathorn* (74 N. Y. 490), viz.: "Such assignment is expressly declared to protect the debtor paying the assignee against the subsequent suit by the assignor." The reversal in *Hays v. Hathorn* (*supra*) was put upon the ground of the rejection of proof tending to disprove any ownership or interest whatever in the "plaintiff." Here the plaintiff testified viz.: "In regard to the assignments, they hold me responsible whether I collect or not; they are not to pay any costs whether I collect or not." Further on the plaintiff does say, in his testimony, viz.: "Well, if I get the money I will pay them." We think the referee was warranted in finding that the plaintiff was the owner of the demands assigned to him.

Third. The appellant makes a point that the plaintiff

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was not the owner of the claims of Adam Horn and William Nuffer. Upon the subject of the ownership of those claims, the testimony of the plaintiff is as follows: "Adam Horn told me to collect his account; I bought it from him. William Nuffer told me the same. He told me: 'I'll hold you responsible for it and you've got to pay me for it.' I hired him." It appears that the amount of the Horn claim was \$2.55 and that of William Nuffer was forty-five cents. As the evidence which we have quoted was all there was upon the subject of the ownership by the plaintiff, of the two demands, we think the referee was warranted in finding in favor of plaintiff in respect to those two demands.

Fourth. It appears by the evidence that the defendant paid George Mehl the amount of his claim, \$1.50. The referee finds that the defendant made the payment, and the defendant testified that he made that payment without any knowledge that the claim had been assigned to the plaintiff. (Fol. 62.) We think the defendant ought not to have been charged with the Mehl account. Code Civ. Pro., § 1909. We also think that he should not have been charged with the Chris John Herrig account, which amounted to \$1.50, and as we understand the referee's report, the gross sum of \$57.58 includes both of those items. We therefore think the report and judgment thereon should be modified by striking out \$3.00, together with the interest thereon from the 11th day of November, 1887, which apparently has been allowed to the plaintiff.

Fifth. The referee allowed the plaintiff to recover for sixty-one hours' work at fifteen cents an hour. Plaintiff testified at fol. 46, viz: "I know of my own knowledge I worked fifty-one hours between August 13th and 25th." It appears that the memoranda of the hours' work by the plaintiff were kept in a book by his daughter; she was not produced as a witness, and no satisfactory reason was given why she was not called to testify to the correctness of the memoranda made by her. The plaintiff testified, (fol. 45 :) "I

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cannot read writing ; I saw my daughter write down those days ; I can't read those days, but I can read the figures and I know they are down correct." We think, under the circumstances, the plaintiff did not establish satisfactorily that he had worked more than fifty-one hours. We are, therefore, inclined to deduct from the referee's report ten hours' work at fifteen cents an hour, amounting to \$1.50.

Sixth. We think the defendant is not entitled to have credit for the tow-line ; the testimony of the plaintiff is, he was requested by the defendant to furnish it, and that subsequently he asked the defendant for the line, and the defendant replied, " he would pay me for it." (Fol. 32.)

Seventh. We think the referee was warranted in charging the defendant with the value of the globe lamp ; the defendant received it from the plaintiff and continued to use it, and when the plaintiff asked for it he was told by the defendant's servant that if it was taken away that they would not have any left to use, and the testimony is to the effect that the defendant asked the plaintiff to furnish " anything the boat needed." (Fol. 13).

We, therefore, think the referee properly allowed the plaintiff to recover seventy-five cents for the globe lamp.

Judgment reversed and a new trial ordered before another referee, with costs to abide the event, unless the plaintiff shall stipulate to reduce the report and judgment the sum of \$4.50 and the interest thereon from the date of the referee's report ; in which event the report and judgment, as so modified, are affirmed, without costs of the appeal to either party.

MARTIN and MERWIN, JJ., concur.

Statement of the Case.

MARGARET DEXTER, Respondent, v. RANDOLPH BEARD,
Appellant.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1889.

Injunction. Right of way.—Where a right of way is conveyed by a deed, to be used by the parties in common, and not to be incumbered or built upon by either party, a building extending upon said right of way is a breach of said covenant, and the granting of an injunction to enforce the covenant not to build is a proper exercise of the discretion of the court.

Appeal from a judgment entered upon a decision of special term granting plaintiff an injunction.

The action was brought to restrain the defendant from encroaching upon, incumbering or building upon a certain right of way appurtenant to the plaintiff's premises in the village of Cortland; and the decision at special term orders an abatement or removal of the encroachment or obstruction placed in the lane. The principal question in the case turns upon the construction of the clause found in the deed bearing date the 5th day of May, 1846, executed by Parker Crosby and wife to William O. Barnard. In that deed a certain village lot was conveyed, and following the description of the premises thus conveyed, is the following language, viz.: "Also a right of way the whole length of the south line of the above described lot, between the said south line and a line drawn parallel with the north side of the store now occupied by James Van Valen, on the grantor's village lot, this day mortgaged to said grantee, to be used by the grantee in common with the grantor, said lane not to be incumbered or built upon by either party, together with all and singular the rights, members, privileges, hereditaments and appurtenances whatsoever unto the said above mentioned

and described premises, in anywise appertaining or belonging."

It was found at the special term that "the plaintiff and her grantors were owners of the right of way mentioned and described in the complaint. * * *

"*Second.* That said right of way is of the width of sixteen feet, and extends in length from Main street, or easterly, to a distance of more than ninety feet, the same being defined in the deeds.

"*Third.* That this action was commenced on the 18th day of October, 1884, at which time the defendant had commenced to build, and has since built, on his premises, bounding said right of way on the south, a brick building of the height of four stories, and extending from Main street, in Cortland village, east a distance of ninety feet, and said structure or building extends into said lane and right of way four and four-tenths feet in width from north to south, and ninety feet in length from west to east, and obstructs said right of way over said whole distance to the extent of four and four-tenths feet in width and ninety feet in length, and is an unlawful structure and obstruction to plaintiff's said right of way, and to that extent is a breach of the covenant contained in the deeds, to the effect that said right of way is 'to be used by the parties in common, and said lane not to be incumbered or built upon by either party' mentioned in the complaint, and both parties derived their titles under or according to the deeds or conveyances specified in the complaint in this action."

Duell & Benedict, for appellant.

Eggleston & Smith, for respondent.

HARDIN, P. J.—After an examination of the case presented to us by the appeal papers, we have come to the conclusion that the decision made at special term should be

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sustained. We are satisfied with the opinion delivered by the trial judge at the special term, and, therefore, we follow it in disposing of the case before us. In addition to the questions discussed in that opinion, it is now insisted, in behalf of the appellant, that the covenant not to build upon the lane should not be enforced in equity "where the plaintiff can have full indemnity in damages." Whether she could obtain full damages by an action or actions at law was not made clear at the trial. How could the depreciation of the plaintiff's property, and the effect thereto of the encroachments and obstructions in the future, be determined and recovered for in an action at law. *Uline v. N. Y. C. and H. R. R. R. Co.*, 101 N. Y. 98.

Whether an injunction should issue or not in the case like this is a question calling for the discretion of an equity court. The discretion is not an arbitrary one, but is such a judicial discretion as follows well-regulated equity principles and precedents. We think the discretion was exercised in the right direction by the special term, and in accordance with the principles and precedents adopted and approved by the court of last resort. *Wheelock v. Noonan*, 108 N. Y. 179; 13 N. Y. State Rep. 110, and cases referred to in the opinion of FINCH, J.; *Story v. New York Elevated Railroad Company*, 90 N. Y. 122; *Davis v. Lamberson*, 56 Barb. 480; *DeWitt v. Van Schoyk*, 35 Hun, 103, and cases referred to in the opinion of HARDIN, P. J.; s. c., affirmed, 110 N. Y. 7; 16 N. Y. State Rep. 726, and the opinion delivered in this court approved.

It is quite apparent that the object of the covenant, in respect to the open space was to secure the space from incumbrances and buildings, and therefore "the injunction of a court of equity, to enforce the covenant, was proper." *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 401.

The change in the neighborhood and circumstances surrounding the subject of the covenant in the case reported as *Trustees of Columbia College v. Thacher* (87 N. Y. 311)

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were exceptional, and the court, in its decision, did not intend to disturb the rule stated in the cases to which we have alluded.

These views lead us to sustain the decision made at special term.

Judgment affirmed, with costs.

MARTIN J., concurs ; MERWIN, J., not sitting.

JACOB ACKERMAN *et al.*, Appellants, v. JAMES O'GORMAN,
Impleaded, etc., Respondent.

N. Y. Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Costs. Section 3234.*—The defendant, in an action of replevin in which the complaint sets forth but a single cause of action, is not entitled to costs, where he recovers a portion, and the plaintiff, the rest, of the chattels.
- A complaint in replevin does not set forth two or more causes of action, though the goods, claimed to have been wrongfully taken and detained, were sold at different times and delivered at different places.

See Note at the end of this case.

Appeal from a special term order allowing one of the defendants a bill of costs.

This was an action in replevin to recover the possession of a quantity of boots, shoes and rubbers, held by the defendant, O'Gorman, as assignee, under the general assignment of Dennis Murphy, who obtained possession of the goods by virtue of purchases, which the plaintiffs claimed were fraudulent, so that no title passed. Murphy was engaged in business at the city of Oswego and also at Oswego Falls.

A part of the goods replevied were found at the Oswego store and a part at the Oswego Falls store.

The complaint contained but one count, and alleged that the defendant, O'Gorman, on or about the 14th of January,

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1888, at the city of Oswego, wrongfully took and wrongfully detains from plaintiffs certain goods described in a schedule annexed; that the plaintiffs are the owners and entitled to the possession; that the goods are of the value of \$236.45; that on the 14th of January, 1888, demand was made of O'Gorman, and he refused to deliver.

The answer contains, first, a general denial except the demand. It then alleges that Murphy was the owner of the property, and on the 13th of January, 1888, executed and delivered to O'Gorman a general assignment for the benefit of creditors, under which O'Gorman took possession and holds and owns, as assignee, all the property named in the complaint that had ever been purchased by Murphy.

The defendant seems to have served on plaintiffs a bill of particulars or notice, specifying certain goods as taken from store at Oswego and certain others as taken from store at Oswego Falls, and stating that, of the goods replevied and taken by the plaintiffs, those were the ones to which the assignee claimed title, and to none others.

Upon the trial a verdict was ordered, for the plaintiffs for the possession of the goods taken from the Oswego Falls store, and fixing their value at \$158.94, with six cents damages for detention, and for the defendant for the possession of the remaining goods fixing their value at \$77.51, with six cents damages for detention. On the 7th of February, 1889, judgment was entered in accordance with the verdict, adjudging that plaintiffs have and retain possession of the goods awarded to them, and that defendant recover of plaintiffs, the possession of the goods awarded to him, the judgment specifically describing the goods awarded to each. Costs were taxed by the clerk in favor of the plaintiffs, but he refused to tax the defendant's costs. Then the motion was made which resulted in the order appealed from.

It appears from the record, that the goods awarded to O'Gorman by the verdict, were sold to Murphy at a differ-

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ent time, and delivered to him at a different place than the goods which the plaintiffs recovered.

Smith, Kellogg & Wells, for appellants.

John B. Higgins, for respondent.

MERWIN, J.—Our decision in this case must be controlled by the decision of the court of appeals in the *Newell Universal Mill Co. v. Muxlow* (24 N. Y. State Rep. 545). In that case at general term (51 Hun, 453; 20 N. Y. State Rep. 914), it was held that, in an action of replevin, when the plaintiff recovered a portion of the chattels sued for, and the defendant the rest, the defendant was entitled to costs, following the case of *Ackerman v. De Lude* (36 Hun, 44). The court of appeals reversed the general term, holding that the right to costs in such cases is regulated exclusively by the provisions of section 3234 of the Code, which explicitly declares that the right of the defendant to costs depends upon the condition that the plaintiff has, by his complaint, separately set forth two or more causes of action upon which issues of fact have been joined; that the rules on this subject pertaining to the former action of replevin do not apply, and that section 1728 of the Code has no bearing on the subject. The remedy of the defendant, it is said, is through an offer of judgment. The court adopted the views expressed by the supreme court in the case of *Kilburn v. Lowe* (37 Hun, 237).

In the present case, the complaint did not set forth two or more causes of action. In form it was quite similar to the complaint in the *Newell Co. Case*.

It follows, that the order appealed from must be reversed, with ten dollars costs and disbursements, and the motion of the defendant O'Gorman, for costs, denied.

HARDIN, P. J., and MARTIN, J., concur.

Note on the Right of Defendant to Costs.

NOTE ON THE RIGHT OF DEFENDANT TO COSTS, WHERE THERE ARE SEVERAL ISSUES OF FACT.

The defendant's right to costs, where several issues are involved in an action, and he succeeds as to some, and the plaintiff as to the other of said issues, depends upon the provisions of section 3234 of the Code. Still the decisions under the Revised Statutes and during the operation of the former Code, may throw some light on the question and aid in arriving at an understanding of the present views of the courts in regard to this section. The cases under the Revised Statutes will be first examined.

Under Revised Statutes.—In *Seymour v. Billings*, 12 Wend. 285, it was held that, where the declaration in replevin contained only one count for a variety of articles, and a plea of property was interposed by the defendant, and the jury found the title to a portion of the articles to be in the plaintiff, the value of which exceeds \$50, and the title to the residue of the articles in the defendant, the value of which was \$90, each party was entitled to recover costs against the other. The declaration was regarded as containing two distinct counts for the respective parcels, or the plea was viewed as a separate and distinct avowry for each parcel.

And in *Rogers v. Arnold*, 12 Wend. 289, note, where a defendant, in replevin, pleads property in the goods, as to a portion of which the issue is found in his favor, and as to the remainder, whose value is less than \$50, the title is found to be in plaintiff, it was held that the defendant is entitled to recover costs, and the plaintiff can recover no more costs than damages.

Where a defendant in replevin avows and justifies the taking, and only a part of the property is found in his favor, the value of which is assessed at less than \$50, he is entitled to no more costs than damages. *Small v. Bixley*, 18 Wend. 514. The defendant's right to costs turned upon the idea that he stood in the attitude of plaintiff, and must succeed in defending an amount of property that would entitle a plaintiff to costs; but the court, in *Johnson v. Fellows*, 6 Hill, 353, intimated that there was no reason for regarding him in the light of a plaintiff on the question of final costs.

The statute (2 R. S. 617, section 26) giving costs to a defendant where one or more of several issues are determined in his favor, and the others in favor of the plaintiff, applies only to cases in which a verdict is actually rendered for the defendant. *Briggs v. Allen*, 4 Hill, 538.

And the court, in *Johnson v. Fellows*, *ante*, held that, where a verdict in replevin is rendered, which gives the defendant a right to have return of part of the property, though its value be assessed at

Note on the Right of Defendant to Costs.

less than fifty dollars, and the other issues are decided against him, he is nevertheless entitled to full costs of the issue found in his favor. The declaration in this case contained but one count, but the court regarded the matter as though there had been separate avowries for each parcel of the property.

The provisions allowing a defendant, who had judgment against him on the whole record, the costs of an issue found in his favor "in cases where there are two or more distinct causes of action in separate counts, did not apply where the different counts were for separate sums payable by the same covenant which might have been included in one count. *Bull v. Ketchum*, 2 Denio, 188.

And in *Hull v. Halsted*, 1 How. 174, the court held that where both parties recover a portion of the property in an action of replevin, and the value of each portion is assessed, each party is entitled to costs, provided the amounts are sufficient to carry costs.

Under former Code.—The right to recover costs in an action is statutory, and, unless the party claiming them can show a statute in his favor, he must fail. *Stoddard v. Clarke*, 9 Abb. N. S. 310.

The provision of 2 R. S. 618, section 26, that where several issues are joined, and there are two or more distinct causes of action in separate counts, each party shall recover costs on the issues found for him, is superseded by the Code of Procedure. *Stoddard v. Clark*, *ante*.

Where the plaintiff, in an action to recover specific personal property, recovers property exceeding fifty dollars in value, he is entitled, and though defendant also recovers property exceeding that value, he is not entitled, to costs. *Id*.

So, in *Watson v. Gardiner*, 50 N. Y. 671, the court held that, where two causes of action are set forth in the complaint, and the defendant succeeds in his defense to one of them, but a judgment is obtained against him upon the other, he is not entitled to costs for the successful defense, on the ground that sections 30 and 305 of the former Code had superseded the provisions of 2 R. S. 617, section 26.

Under the former Code and prior to the enactment of section 3234 of the present Code, it was held that, in an action to recover the possession of personal property, although the jury may find in favor of the defendant for the greater portion thereof, yet if they find in favor of plaintiff for any part thereof, the defendant is not entitled to costs, and that it was immaterial whether the defendant returned or allowed the property to be delivered to plaintiff under the provisional writ. *Vowles v. Murray*, 50 How. 159.

By section 305 of the former Code, costs are allowed of course to the defendant, unless the plaintiff is entitled to costs in the action. No provision is made in this Code for cases where several causes of action

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are united in one suit, and the plaintiff succeeds as to some, and the defendant as to the other causes of action.

Under present Code.—Section 3234. In an action specified in section 3228 of this act, wherein the complaint sets forth separately two or more causes of action, upon which issues of fact were joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case the plaintiff only is entitled to costs. Costs, to which a party is so entitled, must be included in the final judgment, by adding them to, or off-setting them against, the sum awarded to the prevailing party; or otherwise, as the case requires. But this section does not entitle a plaintiff to costs, in a case specified in subdivision fourth of section 3228 of this act, where he is not entitled to costs, as prescribed in that subdivision.

The language of section 3234 of the Code refers to actions to recover chattels, and declares explicitly that the right of the defendant to costs depends upon the condition that the plaintiff has, by his complaint, separately set forth two or more causes of action upon which issues of fact have been joined; and, even when such is the case, the defendant is not entitled to costs when it is certified that the substantial cause of action was the same upon each issue. *Newall Universal Mill Co. v. Muxlow, ante.*

Analogies drawn from the characteristics of the former action of replevin are not sufficient to overthrow or vary the clear and explicit language contained in section 3234 of the Code. *Newall Universal Mill Co. v. Muxlow, ante; Kilburn v. Lowe, ante.* The action of replevin was abolished by the Code of Procedure and its peculiar and destructive features suspended by the rules of practice therein provided for the conduct of actions of claim and delivery. *Newall Universal Mill Co. v. Muxlow, ante.* See *Stoddard v. Clarke, ante; Watson v. Gardiner, ante.*

Under the Revised Statutes, the rule was that in order to entitle the defendant to recover costs, there must be a verdict or finding in his favor upon one or more of the counts set forth in the declaration; and that where there was a general verdict in favor of the plaintiff, and no separate verdict rendered for the defendant, he could not recover costs. *Cooper v. Jolly*, 30 Hun, 224. This case applied the same rule to section 3234 of the Code and held that there must be a separate and distinct recovery on the part of the defendant in order to entitle him to costs. The action was for the recovery of penalties under chapter 518 of the Laws of 1864, as amended by chap. 237, Laws of 1878. The complaint sets forth separately twenty-three causes of action and the answer was a general denial. On the trial, the jury found a verdict for

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the plaintiff for two counts at fifty dollars each, amounting to one hundred dollars. The court held that the defendant was not entitled to costs, as he had not recovered upon any of the issues within the meaning of section 3234 of the Code. This case was affirmed in the court of appeals as noted in 96 N. Y. 667.

In *Barlow v. Barlow*, 35 Hun, 50, the complaint set forth two causes of action; one, upon an express promise made by the defendant to pay an agreed price for work and labor performed by the plaintiff prior to March, 1868; the other, upon an implied promise to pay for work and labor performed by her after that time and prior to 1880. Upon the trial, the plaintiff recovered upon the first, but not upon the second, cause of action. The general term held that the direction of the court below that the defendant's costs be taxed and set off against the plaintiff's judgment, was error. The defendant was not entitled to recover costs in this case, inasmuch as the substantial cause of action was the same upon each issue, within the meaning of these terms as used in section 3234 of the Code; and, in case the complaint set forth two causes of action, upon one only of which the plaintiff recovers, the defendant has not recovered upon any issue within the above section. See 30 Hun, 224.

In *Crosley v. Cobb*, 42 Hun, 166, the complaint contained four counts; but at the trial, it was held, upon defendant's motion, that the second and third count did not state a cause of action, and the plaintiff recovered a general verdict of fifty dollars. The court held that the defendant was not entitled to recover costs, under section 3234 of the Code, as there was no recovery or verdict upon a cause of action in favor of the defendant. Though the defendant did not demur to the defective counts, yet he raised the question at the trial, and it was held, as a matter of law, that the counts did not state facts sufficient to constitute a cause of action.

In *Reed v. Batten*, 22 Abb. N. C. 69, the action was brought for the conversion of two parcels of personal property, each of which parcels constituted a separate and distinct cause of action, and the answer consisted of a general denial of each and every allegation contained in the complaint. Upon the trial the court held that the plaintiff was not entitled to maintain the action for the second cause of action, and the jury, upon the submission of the other cause of action, rendered a verdict for the sum of \$51.50. An allowance of costs to defendant was refused on the ground that the only recovery in the action was in favor of plaintiff, and the case for that reason was not brought within the requirements of section 3234 of the Code, upon which in the cases therein mentioned the defendant has been secured the right to costs.

In *Blashfield v. Blashfield*, 41 Hun, 249, the complaint set forth in

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separate counts two causes of action, one on a note for \$200, and the other on a note for \$100.¹³ The answer set up the statute of limitations to each note. Upon the trial, the court granted defendant's motion to strike out and eliminate the \$200 note from the case on the ground that it was barred by the statute of limitations, and the jury returned a verdict for plaintiff upon the other note. There was no certificate that the substantial cause of action was the same upon each issue, as provided in section 3234 of the Code. The defendant was allowed to tax costs against the plaintiff, on the ground that he recovered upon the issues of fact joined as to one of the causes of action set forth in the complaint. The special term refused, on motion, to set aside the taxation and the order of the special term was affirmed by the general term. The general term placed its decision upon the ground that there was an issue of fact as to each of the two notes set out in the complaint, and a recovery by plaintiff on one and a recovery by defendant on the issue of fact as to the other. *Crosley v. Cobb, ante*. There is no discrepancy between the decision in *Crosley v. Cobb, ante*, and *Blashfield v. Blashfield, ante*, though such intimation is made in *Reed v. Batten, ante*, which is a special term decision. The section does not demand that the issues of fact be tried by, nor the recovery be had before, a jury; the decision of the issues of fact, or a recovery rendered, by the court in favor of the defendant would satisfy the requirements of the section. In *Blashfield v. Blashfield, ante*, the defense of the statute of limitations to the \$200 note raised an issue of fact, which was decided on the evidence by the court in favor of the defendant, in withdrawing it, on defendant's motion, from the consideration of the jury. A motion on the trial as to the sufficiency of a count presents, in effect, an issue of law, and such was the case in *Crosley v. Cobb, ante*. There is more question as to the correctness of the decision in *Reed v. Batten, ante*, but the determination of all the cases are put on one ground, viz.: the recovery, or want of recovery, upon an issue of fact in one or more causes of action in the complaint in favor of the defendant.

Section 1728 of the Code has no bearing upon the question of costs. This section was intended to enable a defendant to recover for a portion of the chattels replevied, though the plaintiff should recover for others, and authorized such an amendment of the pleadings as the rights of the parties required. But it was not intended by this section to render the express requirements of section 3234 nugatory, by awarding costs to defendant also, in case he recovered a portion of the replevied goods. *Newell Universal Mill Co. v. Muxlow, ante*; rev'g 16 N. Y. C. P. 153; 51 Hun, 453; *Mertens v. Fitzwater*, 53 Hun, 597.

In *Newell Universal Mill Co. v. Muxlow, ante*, the complaint in an action to recover possession of several chattels contained a single

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count, and the answer set up several defenses, some covering the whole property and others applying to only a portion thereof, and both parties succeeded as to a part of the replevied property; it was held that the defendant was not entitled to costs.

In *Kilburn v. Lowe*, *ante*, the complaint set forth only one cause of action, and upon the trial the plaintiff was adjudged to recover a portion, and the defendant, the balance, of the replevied goods. The defendant was held not to be entitled to costs under section 3234 of the Code, as under that section he cannot recover them unless the complaint sets forth separately two or more causes of action upon which issues of fact are joined. The apparent design was to give to both parties costs in a case in which the complaint sets forth more than one cause of action, provided both parties recover upon one or more of the causes of action.

Where the complaint does not set forth separately two or more causes of action, and the plaintiff recovers a portion, and the defendant the remainder, of the property, the defendant is not entitled to costs under section 3234 of the Code. *Mertens v. Fitzwater*, *ante*.

In *Ackerman v. O'Gorman*, above reported, it is held that the defendant is not entitled to costs under section 3234 of the Code, in an action to recover possession of personal property, where the complaint contains but one count, though he recovers as to some of the property. To entitle him to costs in such case, the complaint must set forth separately two or more causes of action.

Where the complaint in an action to recover the possession of personal property alleges in a single count the wrongful taking and detention of certain goods and a refusal to deliver them on demand, it does not set forth two or more causes of action, even though such goods were sold and delivered to defendant's assignor at different times and places. *Ackerman v. O'Gorman*, *ante*; *Mertens v. Fitzwater*, *ante*; *Goodwin v. Wertheimer*, 99 N. Y. 149.

Where a complaint is dismissed as to one count, and the plaintiff has a verdict in his favor on the second count, he, having obtained the only verdict rendered by the jury, is the only party entitled to costs. *Willard v. Strachan*, 3 N. Y. C. P. 452. The first count in this case was dismissed on a ground, which was not specially pleaded, arose incidentally on the evidence, and was not the substantial issue in the action.

Where the complaint sets up several distinct causes of action, on which separate and distinct issues are taken, and plaintiff succeeds as to one cause of action and falls as to the others, each party is entitled to tax a bill of costs against the other party, and the defendant

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may have his judgment for costs set off against plaintiff's judgment for recovery and costs. *Hudson v. Guttenberg*, 9 Abb. N. C. 415.

Where in an action of claim and delivery brought to recover the possession of goods sold to defendant's assignor at various dates, the complaint contained a single count, and each party recovered a portion of the replevied goods, it was held that the defendant was not entitled to costs against the plaintiff, on the ground that the complaint alleged but one cause of action within the meaning of section 3234 of the Code. *Mertens v. Fitzwater*, *ante*.

Where in an action of ejectment the complaint contained but one count to recover two parcels of land, separately described in the count, and as to both parcels the plaintiff's right to recover was put in issue by the answer, and the verdict was in favor of the plaintiff as to one, and in favor of the defendant as to the other, parcel, the latter is entitled to costs as well as the plaintiff. *Coon v. Deifendorf*, 2 How. N. S. 389. The court held that the same rule, under section 3234 of the Code, prevails in ejectment as in replevin. This case ignores the requirement of the section that the complaint must set forth separately two or more causes of action, etc., and follows *Ackerman v. DeLude*, 36 Hun, 44; 20 W. Dig. 544, which is expressly overruled in *Newell Universal Mill Co., v. Muxlow*, *ante*.

The construction, given to section 3234 of the Code, can work no injustice to the defendant, for section 738 of the Code, has provided him with all necessary protection, where the claim of the plaintiff, set forth in his complaint, is greater than he may prove to be entitled to recover upon the trial. *Reed v. Batten*, *ante*.

JOHN J. WHITE, Appellant, v. HORACE K. THURBER,
Respondent.

Supreme Court, Second Department, General Term, February 10, 1890.

1. *Lease. Covenant.*—An entry by a landlord upon the leased premises to make needful repairs, on requirement and notice of the department of buildings, is not a breach of the covenant for quiet enjoyment, though the tenant refuses to permit the repairs. And, where due care is taken to avoid interfering with the business of the tenant, the latter cannot recover for injuries to it caused thereby.
2. *Same.*—The refusal of the tenant to permit the repairs to be made does not affect the legal right of the landlord to make repairs rendered necessary by the insecure condition of the premises.
See note at end of case.

Action was brought for damages for an alleged wrongful entry on premises owned by defendant and occupied by plaintiff under lease. The entry was made in pursuance of a notice served on defendant by the department of buildings of the city of Brooklyn to repair a building.

Appeal from a judgment dismissing the complaint.

James & Thomas H. Troy (*James Troy*, of counsel), for appellant.

H. Aplington, for respondent.

PRATT, J.—The covenant of quiet enjoyment was not broken by the landlord's entering upon the premises to make needful repairs. That covenant is directed to an eviction by title superior to that of the landlord, and is not

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violated by an unlawful trespass. But in this case the entry was not unlawful. It was in obedience to a high duty owed to society, viz., to keep the building in repair, that it would not injure people by its fall. The refusal of the tenant to permit the repairs to be made does not affect the legal right. It was proven, without dispute, that the landlord acted upon the requirement and notice of the department of buildings, and the evidence is to the effect that due care was taken to avoid interfering with the business of the tenant. Such injury as was caused to plaintiff's business was rendered necessary by the insecure condition of the premises, and cannot be recovered for by action.

Judgment affirmed, with costs.

All concur.

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Without special covenant, the landlord, at common law, was not bound to repair. The tenant in such case, was required to make ordinary, but not substantial, lasting or general repairs.

Where the tenant covenants to keep the demised premises in good repair, he is liable to repair defects existing at the commencement of the lease; but only to make those necessary for his use of the premises.

Under an agreement to make necessary repairs, the tenant is not obliged to put the premises in good repair, or make any repairs or alterations thereon not necessary for his own use of the premises, but which may be necessary for some future or different use of the property.

At common law, the lessee, in case the demised premises became, during the term, wholly untenable by destruction thereof by fire, or otherwise, still remained liable for the rent unless exempted from such liability by some express covenant in his lease. The statute of 1860 was enacted to change this rule and cast the misfortune upon the owner of the demised premises, where the tenant had failed to protect himself by covenants in his lease. This act does not provide that the tenant should cease to be liable for rent, in cases the premises, from any cause, shall become so damaged or out of repair as to be untenable; but only in case of a sudden and total or partial destruction by the elements, acting with unusual power, or by human agency.

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Nor is it the design of the statute to relieve a tenant from the performance of his covenants, even though the destruction was occasioned by a sudden cause.

Where the tenant is to repair the demised premises, by a subsequent arrangement at the landlord's expense, he cannot afterward abandon the premises, by reason of defects therein, without making reasonable efforts to repair them, and without further notice or complaint to the landlord.

Where the tenant fails to keep the demised premises in good repair and condition in accordance with his agreement, he is liable to refund to the landlord the expenses of making them after the termination of the lease.

But where the lease contains a covenant, on the part of the lessee, to surrender up the possession of the premises, at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, and there is no covenant to repair or rebuild, the tenant is not bound to put up new buildings in the places of those, if any, destroyed by fire during the continuance of the term.

But a lessee's covenant in a lease to keep, generally, the buildings in repair binds him to rebuild in case of accidental destruction by fire or otherwise, during the lease; but this is not the case where the covenant is qualified or limited.

The obligation of the landlord in any case to repair, or rebuild the demised premises, rests solely on express covenant or undertaking.

An agreement by a landlord to repair, after it is broken, becomes a chose in action in the tenant's favor, upon which he can maintain an action against the landlord.

The lessor's covenant to repair is to be construed as meaning that he whenever notified that the demised premises need repair, will cause it to be made, and does not render him liable for losses occurring from the want of repairs, of which he was not notified and had no knowledge, unless the lease shows an intention that he should take notice of such want of repair from his own observation. Where neither the landlord nor tenant knew that the premises were out of repair, the loss must be borne by the tenant, unless the former, in addition to his covenant to make the repairs, assumes the duty of ascertaining, from time to time, when they were necessary.

In the case of an apartment house, a tenant, in the absence of an express agreement, is under no obligation to repair the portion of the premises reserved for the common use of all the tenants, but the landlord is bound, without any special contract to that effect, to maintain them in a safe condition.

Where the tenant suffers from the landlord's breach of his contract to repair, he has two remedies; either to do the necessary repairs himself and off-set the costs against the rent; or to show the difference in value between the premises as they were, and as they would have been if properly repaired.

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Where the landlord after covenanting to repair, omits to do so, and the tenants elects to make them, he is bound to be reasonable and judicious in such repairs, but is not compelled to use material of precisely the same kind and value; he may adopt the modern style and improvements.

A tenant whose landlord has agreed to put the premises in repair but has failed to do so, has no right, if he knows that his property will be exposed to injury from the elements, or otherwise endangered if left upon the premises, to take the hazard; and if he does, and his property is injured, he cannot recover therefor from his landlord.

There are exceptions to the general rule that the damages, where a lessor fails to perform his covenant to repair, is the difference between the value of the premises as they were and as they would have been, had they been kept in repair. In cases where the requisite repairs are trifling, and the damages by not making them are large, it is the duty of the tenant to make them and charge the landlord with the cost.

Under a covenant to repair by the landlord, the damages for its breach must be those which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the execution of the contract, as the probable result of its breach, but not for accidental, remote or consequential causes.

The landlord, under such a covenant, is not liable to his tenant in tort for willful refusal or neglect to perform his obligation.

A parol agreement to repair, made by the lessor, after the execution of the lease, unless upon a new consideration, is not binding upon him.

As between landlord and tenant, where there is no fraud or false representation or deceit, and in the absence of an express warranty or covenant to repair, there is no implied warranty or obligation on the part of the landlord that the premises are in a safe condition for use, or that they will not become unsafe during the term. Where he lets premises and agrees to keep them in repair, and fails to do so, in consequence of which a party lawfully upon the premises suffers injury, he is responsible for his own negligence; but he is not liable, where the tenant has agreed to make the repairs prior to the accident and has been allowed therefor by a deduction from the rent.

The lessor of premises, demised in a ruinous state, cannot shield himself from liability to strangers for damages resulting from their defective condition, by taking from the lessee a covenant to keep the premises in good order and repair.

Where the lease contains no covenant to repair.—In *Moffatt v. Smith*, 4 N. Y. 126, it was held that, where there was no agreement on the part of the lessor to repair, the lessee cannot, when sued for the stipulated rent, set up the want of repairs either as a defense or in reduction of the claim.

The tenant, and not the landlord, was held, in *Kastor v. Newhouse*, 4 E. D. Smith, 20, responsible for the damages, where an adjoining

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property is injured, in consequence of a defect arising from want of proper repairs to the demised premises.

In *Coddington v. Dunham*, 3 J. & S. 412; 45 How. 40, it was held that a lessor was not bound to repair the water pipes, outside the demised premises, so as to keep up the supply of Croton water; and that his neglect to do so was no defense to an action for the rent, nor was it a valid counterclaim for damages.

A landlord is not impliedly bound to keep a demised dwelling-house in the same repair as when leased to a tenant or to improve the same, and a direct covenant so to do is necessary to make him liable in damages. *Hays v. Moody*, N. Y. City Ct., 1888.

The landlord is not liable for repairs done by the tenant upon the demised premises, unless on his special agreement to pay for them. *Mumford v. Brown*, 6 Cow. 475; *Moffatt v. Smith*, 4 N. Y. 126; *McCarty v. Ely*, 4 E. D. Smith, 375.

Nor is he, in any case, bound to repair, unless by force of an express covenant or contract. *Howard v. Doolittle*, 3 Duer, 464; *Corey v. Mann*, 6 Id. 679; 14 How. 163; *White v. Meallo*, 5 J. & S. 72.

A landlord, in the absence of a special agreement, is under no obligation to do any act to protect the tenant from the consequences of the lawful acts of an adjoining owner, in excavating to such a depth as to endanger the stability of the demised premises; nor does the act of 1855 vary his duties and liabilities in this respect. *Sherwood v. Seaman*, 2 Bosw. 127; *White v. Meallo*, *ante*.

Where the landlord has covenanted to keep the premises in tenantable repair, it is the duty of the tenant to notify him of the want of repairs. *Wolcott v. Sullivan*, 6 Paige, 117.

Where the premises are occupied, not by the owner but by third persons, it is upon the latter as tenants, and not upon the owner as landlord, that the duty of keeping them in good condition and repair presumptively devolves, where there is no special agreement by which the relative duties of the parties are altered. *Corey v. Mann*, 14 How. 163; *Howard v. Doolittle* 3 Duer, 464.

At common law, the landlord, without special, covenant was not bound to repair. The tenant was bound to treat the premises, so that no injury was done; not to make substantial, lasting or general, but only ordinary, repairs. *White v. Albany Railway*, 17 Hun, 98; *Suydam v. Jackson*, 54 N. Y. 450. This obligation does not extend to making the premises better than they were when the lease began.

The case of *White v. Albany Railway*, *ante*, differs from the case of *Green v. Eden*, 2 N. Y. S. C. 582. In the latter case, the tenant covenanted "as a further rent to keep the premises in good repair and condition." The words "good repair" were held to make him liable to repair defects existing at the commencement of the lease. In the case of *Lockrow v. Horgan*, 58 N. Y. 635, the lessee agreed to make necessary repairs, and to keep the

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premises tenantable at his own costs. The defect which this agreement was held to cover was the settling of a wall owing to defective construction, a matter which took place after the commencement of the lease. Neither of these cases, therefore, shows that an agreement to do necessary repairs requires the lessee to make the premises better than they were.

In the case of *Myers v. Burns*, 35 N. Y. 269, the landlord covenanted to keep the hotel and premises in good, necessary repair, at his own expense. He was held liable to do what was necessary, although the defect had existed at the beginning of the lease. The repairs, however, for which he was thus liable, were those necessary to the tenant's use of the premises.

The ordinary rule, of course, is that the tenant takes the property just as it is, and pays his rent for the use of it in that condition. *White v. Albany Railway*, *ante*. All that he is to do is to restore it as he took it. And this is so reasonable that it would be the probable meaning of any agreement of lease which did not expressly state otherwise. *Id*.

In this case, the defendant was in possession of certain premises as tenant of the plaintiff's testator. The premises were then out of repair. Subsequently the plaintiff's testator leased the premises to the defendant for two years more. The instrument executed by defendant provided that the lease was at a certain annual rent and necessary repairs, with all alterations if needed. The part executed by the lessor stated the yearly rent and that all repairs and alterations necessary were to be made by the tenant as part of the consideration for the lease. And it was held that the tenant was not obliged to put the premises in good repair, or make any repairs or alterations thereon not necessary for its use of the premises.

In the present case, the word "necessary" applied to repairs, was understood to denote such repairs as were necessary to the tenant, and not such as might be necessary for some future or different use of the property, after the lease had expired.

At common law, not only was the lessor, without express covenant to that effect, under no obligation to repair, but, if the demised premises became, during the term, wholly untenable by destruction thereof by fire, flood, tempest or otherwise, the lessee still remained liable for the rent unless exempted from such liability by some express covenant in his lease. *Suydam v. Jackson*, *ante*; *Hallett v. Wylie*, 3 John. 44; *Graves v. Berdan*, 26 N. Y. 498; 3 Kent's Com. 465. But the lessee was under an implied covenant, from his relation to his landlord to make what are called tenantable repairs. He is bound, therefore, to keep the soil in a proper state of cultivation, to preserve the timber and to support and repair the buildings. These duties fall upon him without any express covenant on his part, and a breach of them will, in general, render him liable to be punished for waste. *Id*.

But he was not bound to make substantial, lasting or general repairs, but only such ordinary repairs as were necessary to prevent waste and

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decay of the premises. If a window in a dwelling should blow in, the tenant cannot permit it to remain out and the storms to beat in and greatly injure the premises without liability for permissive waste; and if a shingle or board on the roof should blow off or become out of repair, the tenant cannot permit the water, in time of rain, to flood the premises, and thus injure them, without a similar liability. A slight effort and expense on his part could save a great loss; and, hence, the law justly casts the burden upon him. The Statute of 1860 was not passed to shift this burden from the lessee to the lessor. *Id.*

But it was considered a hard rule that the tenant who had, from ignorance or inadvertence, failed to protect himself by covenants in his lease, should be obliged to pay rent in cases where, from fire, flood or other fortuitous causes, the premises were destroyed or so injured as to be untenable; and it was to change this rule and cast the misfortune upon the owner of the demised premises that the law of 1860 was enacted. This statute provides for two alternatives, viz.: when the premises are "destroyed" or "injured." The first alternative has reference to a sudden and total destruction by the elements, acting with unusual power, or by human agency. The latter has reference to a case of injury to the premises, short of a total destruction, occasioned in the same manner. If the legislature had intended to provide that the tenant should cease to be liable for rent when the premises from any cause became so damaged or out of repair as to be untenable, it would have been easy to have expressed the intent in apt and proper language. The terms "destroyed" and "injured" do not convey the idea of gradual deterioration from the ordinary action of the elements in producing decay, common to all human structures.

Covenant by lessee.—In *Hull v. Burns*, 17 Abb. N. C. 317, the landlord sued his tenant for the amount expended by him for plumbing work upon a dwelling house leased by the former to the latter. The lease contained a covenant on the part of the lessee to make all repairs to the plumbing work, etc., at his own expense during the term, and to fulfill all the ordinances of the city, and all orders or requirements imposed by the board of health, connected with the premises. Upon the complaint of a former tenant of the premises, the board of health had ordered the plumbing work in question to be done by the owner. The order was outstanding when the tenant leased the house, but he had no knowledge thereof. After his term began, he complained to the board of health of the existence of sewer gas, etc., and the landlord was thereupon compelled to execute the orders of the board; and for the cost of the work done he brought this action upon the covenant in the lease. The trial court, upon the motion for a new trial upon the judges' minutes, held that the covenant in question should be construed to require the lessee to comply with the orders of the board of health in regard to defects in the premises arising during the term, and even those existing at the time, unless they could not be ascertained by due diligence, and were known to the lessor and undisclosed by

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him to the lessee; and that the concealment of the existence of the outstanding order of the board of health, when the lease was made, was a wrongful act amounting to a fraud. But on appeal the general term of the N. Y. City court held that the lessee was bound to repay to the lessor the amount expended by him for plumbing work upon the premises, during the term, though an order of the board of health for the repairs to be made by the plaintiff was outstanding when the lease was made, and the lessee had then no knowledge thereof.

In *Thomas v. Nelson*, 69 N. Y. 118, an action was brought to recover rent for the occupancy of certain premises under an alleged lease. There was a defective flue which made the occupancy extremely uncomfortable and inconvenient. The tenant continued to occupy complaining of the flue, until an arrangement was made by which he was to repair the flue at the landlord's expense. And it was held that, after this arrangement, the tenant could not abandon the premises on account of the flue without making reasonable efforts to repair it. His promise was not without consideration, as the landlord agreed to pay him for the labor and expense in doing the work. He could not, on account of the defective condition of the flue and without any further notice or complaint to the lessor, abandon the premises; and he was estopped from complaining of the flue for the reason that it was left out of repair by his own neglect to perform his contract to repair it.

In *Truesdell v. Booth*, 4 Hun, 100, the tenant hired a dwelling house and entered into occupation. He, in addition to the yearly rent, also covenanted to make necessary repairs, which had the effect of reducing the rent slightly, as compared with the rent paid by a prior tenant. There was no covenant to repair on the part of the landlord. The tenant paid rent up to a certain time, gave notice to the landlord that he would not be bound, and abandoned the premises for the reason that they were not tenantable. The walls of the house were usually damp, and the tenant's family became and remained sick for some time by reason of such dampness. It was held that the wrongful acts of the landlord, which amount to mere negligence or trespass, do not bar the rent. The rule is otherwise where the landlord creates a nuisance near the premises, or is guilty of acts which preclude the tenant from the beneficial enjoyment of them, in case the tenant shall abandon the premises by reason thereof. The statute, chap. 345, Laws of 1860, is not available as a defense in such an action.

In *McMann v. Autenreith*, 17 Hun, 163, an action was brought to recover rent falling due upon a lease of certain premises. The tenant agreed to do all the repairs which may be required in and upon said premises at his own cost and expense. The building was an old one when rented, and the tenant fitted it up in some respects for the purposes of his occupancy. Soon after he entered into possession, he placed goods of great weight within the building, and, by reason of this weight, and of the condition of the building itself, the floor settled. In the spring following, the roof and

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floors settled still more in consequence of a snowstorm. Upon the tenant's request, the plaintiff employed a carpenter and made the roof secure. In order to do this, it was necessary to remove a strip of flooring which the tenant requested the landlord to leave open, until he had disposed of his goods stored there. After six months or so, the tenant asked the landlord to lay down this strip of flooring, and the latter refused to do so. The tenant thereupon abandoned the premises. And it was held that the clause in the lease requiring the tenant to surrender in as good condition as reasonable use would permit, damages by the elements excepted, did not relieve him of the obligation to do the repairs in question; and that the covenant in the lease to repair covered this repair to the roof and building, and the case did not fall within the provision of chap. 345, Laws of 1860. It was not the design of that law to relieve a tenant from the performance of his covenants, even though the destruction was occasioned by a sudden cause.

In *Hartford & New York Steamboat Co. v. The Mayor, etc., of N. Y.*, 78 N. Y. 1, the defendant executed a lease or agreement to the plaintiff transferring the right to collect the wharfage of one of its piers, which defendant was required by law to maintain for the public use. Plaintiff took the lease upon the representation that substantial repairs would be made by defendant, and that plaintiff would not be required to make any save ordinary and usual repairs. When the lease was made, the pier was old and substantially destroyed by natural wear and decay, and defects hidden under the surface of the water. The defendant neglected to make such substantial repairs, and in consequence thereof the pier fell, leaving nothing to repair and requiring the erection of an entirely new pier. This defendant refused to build, and plaintiff was compelled to rebuild. Plaintiff brought an action to recover the costs of rebuilding and the damages. The lease provided that plaintiff should keep the pier in good condition and safe and proper repair, and that all alterations, improvements and repairs of whatsoever nature or kind should be made at its expense, and that the pier should revert to defendant at the expiration of the lease. And it was held that the plaintiff assumed the burden of all repairs of every description which the pier might need; that, as between the parties, the city was relieved of all obligation to repair or maintain it, and that the only possible effect of the exception of natural wear and decay, was to qualify or restrict the liability of the plaintiff to the city, to restore the wharf in good condition. Though it was the duty of the city to the public to make such repairs and thus maintain the pier, yet the plaintiff had covenanted with the city to keep the pier in good condition and safe and proper repair; and though this covenant might not affect the liability of the city to the public, it is an answer to a claim by the plaintiff against the city for a loss arising from the want of such repairs.

In *Green v. Eden*, 2 N. Y. S. C. 582, the lessee covenanted to keep the leased building in good repair and condition. At the time he took posses-

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sion the roof and steps were in bad condition. The lessee made such repairs as were needed for his own comfort, and the steps became rotten, and the roof leaked so as to injure the walls and building. The landlord, after the termination of the lease, partially shingled the roof, replaced the gutter, made new steps to the house, and brought an action against the tenant to recover the amount of such expenses. And it was held that these repairs were within the covenant of the lease and that the lessee was liable for the expense of making them. The covenant to keep the house in good repair and condition was not performed by leaving a leaky roof to the house, so that the rain penetrated the building and injured it and its contents; nor by leaving a rotten gutter which would not do its work; nor by leaving steps so rotten as not to be safe to use.

In *Warner v. Hitchings*, 5 Barb. 666, it was held that, where a lease contains a covenant, on the part of the lessees, to surrender up the possession of the premises, at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but there is no covenant to repair or rebuild, and the buildings are destroyed by fire during the continuance of the term, the tenants are not bound to put up new buildings in the place of those destroyed. The liability that the tenants were to rebuild the erections in case of their destruction by fire, is an extraordinary one for the lessees to assume, and when it is intended, it is usually expressed in terms not susceptible of misconstruction. The omission of a covenant to repair from the lease is a strong reason for supposing that neither party intended, by other provisions, to assume or impose the obligations which it creates. This covenant has always been regarded as imposing a more extended liability than the covenant to surrender the premises in as good condition as found. And the insertion of the latter covenant has never been considered as superseding the necessity of the former, when the intention is to charge the tenant with repairs; even those not made necessary by casualty.

It is only by implication that a contract to surrender the premises in the same condition can be held to bind the lessee to rebuild; thus enlarging instead of restraining the signification of the words of the agreement.

The lessees' covenant in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," binds them to rebuild in case of accidental destruction by fire or otherwise. *McIntosh v. Lown*, 49 Barb. 550.

Where the covenant by the lessee is to repair and leave the premises in the same state as he found or received them, or language to that effect, he is merely required to use his best endeavors to keep them in the same tenantable repair, and is not bound, by such a covenant, to restore buildings destroyed by fire or otherwise, during the term, without his fault. This is in consequence of a construction given to the covenant, that the lessee is so to repair or keep in repair the buildings, etc., as to leave the demised premises in the same state as he received them. But where the covenant

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is to repair or keep in repair, generally, the buildings, etc., without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, etc., in case of the accidental destruction of the buildings.

In *Lockrow v. Horgan*, *ante*, an action was brought to recover rent and for repairs, also for improvements put upon the demised premises by the tenant and removed by him. The lease contained a covenant, on the part of the tenant, to make such improvements as he might require, also to make all necessary repairs and to keep the premises in tenantable order at his own cost, and to leave all the improvements upon the premises at the expiration of the lease. The premises became untenable because of the settling of the rear wall of the building, owing to the original defective construction of the foundation, and the tenant abandoned them. He claimed that his covenant to repair did not cover such a defect, and that he was exonerated from the payment of rent by reason of the premises becoming untenable. And it was held that the covenant was absolute to make all necessary repairs and keep the premises in tenantable order, and, in the absence of fraud on the part of the landlord, the tenant was bound to make the repairs irrespective of the cause of the defect; and that in case the tenant abandons the premises without making the repairs, the landlord has a right to make them and recover the expenses. See *Ward v. Kelsey*, 38 N. Y. 80.

In *Vanderpoel v. Smith*, 2 Daly, 135, the lease provided that, if the building should be destroyed and burned down, and the lessor should not rebuild within a reasonable time, the tenant should have the right to terminate the lease. And it was held that a partial injury by fire, which could be repaired, without rebuilding, was not within the covenant.

So, in *Warner v. Hitchings*, *ante*, it was held that the tenant, under a covenant to surrender up the premises, at the expiration of the term, in the same condition, natural wear and tear excepted, was not bound to rebuild, in case of destruction by accidental fire; that he can only be made responsible, in such case, on an express covenant to repair or rebuild.

Landlord's covenant.—In *Witty v. Matthews*, 52 N. Y. 512, it was held that the obligation of the landlord in any case to repair, or rebuild demised premises, rests solely on express covenant or undertaking. Without an express covenant to that effect by the lessor he is neither bound to repair the demised premises himself, nor to pay for repairs made by the tenant. See *Mumford v. Brown*, 6 Cow. 475.

In the former case, an action was brought for breach of covenant of quiet enjoyment in a lease. The lease contained the following condition: "And it is further agreed between the parties to these presents that in case the premises hereby leased shall be partially damaged by fire, but not rendered wholly untenable, the same shall be repaired with all proper speed, at the expense of the said party of the first part," (the landlord). During the term a fire occurred which damaged the premises and rendered them wholly untenable. And it was held that by the terms of the demise,

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the lessor has undertaken to repair, in case the premises should be partially damaged by fire, but not rendered wholly untenable, with all proper speed at his own expense ; and that the duty of repair, under such circumstances, was upon the defendant, and that, if he should fail to repair within a reasonable time, the tenant might repair and hold the landlord for the necessary expense. See *Myers v. Burns*, 33 Barb. 401. There was no covenant by the landlord to repair under any other circumstances, and this covenant cannot be imported into any other clause of the lease, or a liability implied to repair any damage or injury to the premises other than such as shall be occasioned by fire, and shall leave the premises tenantable in whole or in a part. As a covenant to repair is not applied by law, an express covenant will not be enlarged by construction. Such implication is forbidden when the landlord has expressly covenanted to repair under other circumstances and less extensive damages. The law assumes in such case that the parties have made express provision for every case in which the landlord should be held to repair. *Witty v. Matthews*, *ante* ; *Kent v. Welch*, 7 John. 258 ; *Frost v. Raymond*, 2 Caines, 192 ; *Vanderkarr v. Vanderkarr*, 11 John. 122. When parties have entered into written engagements, with express stipulations, they ought not to be extended by implication, for the presumption is, that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. The parties will be held, rather in the absence of any evidence of fraud or mistake, to have included the whole contract in the terms of the written agreement.

In *Mirick v. Bashford*, 38 Barb. 191, the owner of a warehouse leased it to a tenant with a contract to repair it, and then conveyed the property to the plaintiff. The contract to convey was made, while the tenant was in possession under a verbal lease from the owner which would expire in a short time thereafter ; and, by the lease, the repairs were to be made immediately, so that the tenant could enjoy the benefit of them during the remainder of the term. After making the contract to convey, the owner refused to make the repairs in consequence of his agreement to convey, and conveyed the premises to the plaintiff. And it was held that, after an agreement by a landlord to repair is broken, it becomes a chose in action in the tenant's favor, upon which he can maintain an action against the landlord.

But, if the grantee in fee of the landlord refuses to recognize any liability to repair, and the tenant, with notice of such refusal, attorns to him and pays him rent, the grantee is not liable on the landlord's contract to repair, if such contract was broken, and the landlord's liability for the breach was complete, before the grantee had acquired any legal estate in the premises.

And if, after a purchaser from the landlord has repudiated the landlord's covenant to repair, and refused to perform it, the tenant, avowing his intention to hold the lessor upon his covenant, continues in possession of the premises, attorning to the purchaser by the payment of rent, without ob-

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jection, as it becomes due, this will be held to be evidence, *prima facie* at least, of a waiver by the tenant of any claim against the purchaser, on the landlord's covenant to repair.

Extent of covenant.—It was held in *Thomas v. Kingsland*, 12 Daly, 315, that a covenant to "keep in repair" involves a covenant to put in repair, because, until premises are first put in repair, they cannot be kept in repair. A covenant to "put in repair" carries with it an implied admission that the premises are out of repair; but such admission is not conclusive, for it may be shown that the premises do not require reparation. Except for such implied admission, there is no difference between a covenant to "keep in repair," and a covenant to "put and keep in repair." *Id.*

A covenant to repair, on the part of the lessor, was held, in *Ward v. Kelsey*, 38 N. Y. 80, to require him not only to keep the premises in good repair, but to put them in that condition. See *Myers v. Burns*, 35 N. Y. 269.

There is no implied covenant on the part of a landlord that a building shall continue fit for the purpose for which it was demised, even where it is let for a special purpose, and though its use or occupation for any other is, in terms, prohibited. *Howard v. Doolittle*, *ante*.

If a landlord covenant to repair, the fact that the premises are out of repair is not a defense to an action for rent; in such case the tenant can only recoup his damages. *Harger v. Edmonds*, 4 Barb. 256.

In *Speckles v. Sax*, 1 E. D. Smith, 253, the lessor's failure to repair, where he is bound to do so by his contract, was held not to amount to an eviction, but only to a breach of covenant.

A landlord who leases part of a building to a tenant, under a covenant that the latter should keep the plumbing in the demised portion of the building in repair, but who himself omits properly to repair and preserve the plumbing in the rest of the building, so that the demised premises become by reason thereof untenable and unfit for occupancy, which compels the tenant to leave the building, cannot recover for rent subsequently accruing. *St. Michael's Prot. E. Ch. v. Behrens*, 10 N. Y. C. P. 181.

In *Heintze v. Erlacher*, 1 Rob. C. C. 463, a covenant on the part of the tenant to repair was held to extend to all repairs, irrespective of the cause of the defect.

A lease of a dwelling house in the city of New York was made, wherein the lessee covenanted during the term, at his own cost and expense, to make and to do all repairs required to the plumbing work and pipes, range and fixtures, belonging thereto, and to keep the Croton pipes, and the connections with the Croton main, free from ice and other obstructions at his own expense, and to keep the sewer connections free from obstructions to the satisfaction of the municipal and police authorities, and not to call upon the lessor for any disbursements or outlay during the term, and to promptly execute and fulfill all the city ordinances applicable to said prem-

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ises, and all orders and requirements imposed by the board of health and police department, in, upon, or connected with the premises, during the term, at his own expense. And it was held that, under such covenant, the lessee was bound to repay to the lessor the amount expended by the latter for plumbing work done upon the premises during the term of the lease. *Hull v. Burns*, 17 Abb. N. C. 317.

Notice.—A covenant in a lease of the upper part of a building, on the part of the lessor, to put and keep the roof of the building in good repair, is to be construed as meaning that the lessor, whenever notified that the roof needs repairs, will cause them to be made, and does not render him liable for losses occurring from the want of repairs of which he was not notified and had no knowledge. *Thomas v. Kingsland*, *ante*.

In *Macon v. Wilkinson*, L. R. 6 Exch. 25, it was held that where the lessor covenanted to keep the main walls, main timbers and roof in repair, as the lessor could have no knowledge of the state of the main timbers or the roof, without notice of their condition, the lessee could not maintain an action for the breach of the covenant, where he had not given to the lessor notice that repairs were required.

So, *Sutherland on damages* states that the lessee must give notice to the landlord to make repairs, unless the lease shows an intention that the lessor should take notice from his own observation. This intention will not be implied, where the lease does not give the landlord the right to enter and view the premises. The general rule is that notice to perform is necessary, whenever the facts, on the occurrence of which the right to claim performance depends, lie more peculiarly in the knowledge of the party claiming such right.

The tenant is in possession of the premises, and, therefore, in a better position than his landlord to know the condition of the building. *Thomas v. Kingsland*, *ante*. Defects in a roof cannot, as a general thing, be easily seen, and sometimes it is almost impossible to discover them even when it is certain that they exist. If the landlord was bound to find and repair them before they had made their presence known, it will place him in the position of an insurer. But he does not insure; he merely agrees to repair. He does not intend to guaranty that the tenant shall not sustain any injury through a defect in the roof, but he does undertake to restore the roof to a state of repair, whenever it is known to be in disrepair.

In *Leavitt v. Fletcher*, 10 Allen, 119, there was a covenant to make all necessary repairs to the outside of the building. The lessor reserved the privilege to enter and view the premises, for the purpose of making improvements. The roof, by reason of the snow that lay upon it, fell and injured the tenant's carriage. An action was brought to recover compensation for the loss of the carriage. And it was held that the landlord was not liable for the damages occasioned by the fall of the building. He did not covenant that the outside shall not fall, but that if it does, he will repair it.

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Unless the landlord knows that the roof stands in need of repairs, so that notice to him is unnecessary, he ought not to be made liable for losses occurring through a failure to repair, where he has not failed to do what was necessary after he had been notified that repairs were required. *Thomas v. Kingsland, ante*. In case of a lessor's covenant to repair, the tenant should not be allowed to recover damages resulting from a want of repairs, of which he was aware, but of which he suffered the landlord to remain in ignorance. A man cannot recover damages for an injury that he could either avert or avoid. *Id*.

Where neither the landlord nor the tenant knew the premises to be out of repair, the loss must be borne by the person on whom it falls; if that person is the tenant, he cannot charge the loss to his landlord, unless the latter, in addition to his covenant to make the repairs, took upon himself the duty of ascertaining from time to time when they were necessary. *Id*.

In *Thomas v. Kingsland*, 108 N. Y. 616, the landlord covenanted, in his lease, to put and keep the roof of the demised premises in good repair. A new roof had been put on the premises the year before, and there was no proof that it had leaked or manifested defects up to the date of the tenancy. And it was held that the covenant did not imply that the roof was out of repair to the knowledge of the landlord at the time of the execution of the lease. The covenant must have a natural and reasonable interpretation. The defects complained of were such as could not easily be discovered and might not be suspected until made manifest by rain or snow, and the tenant in possession could discover and locate them while the landlord remained in ignorance. Under such circumstances, fairness requires that, unless the facts disclose a faulty roof known to the landlord, or at least which he ought to have known, defects occurring should be brought to his notice by the tenant.

Apartments.—A tenant from year to year renting part of a dwelling house, which is also occupied by other tenants, in the absence of an express agreement, is under no obligation to make repairs of a general, substantial and lasting nature. *Bold v. O'Brien*, 17 Weekly Dig. 466. The landlord, so far as the tenant is concerned, where the latter occupies but a small portion of the tenement, is bound to keep the parts of the tenement under his control in such a state of repair that the tenant may occupy his premises with safety. *Id*. And where the defect of the building is of a general character, and extends beyond the premises occupied by the tenant, unless he has been guilty of some contributory negligence, he, being one of a number of co-tenants, is entitled to recover the damages which he has sustained by the falling of the entire tenement building. *Id.*; *Vanderpoel v. Smith*, 2 Daly, 140.

Where, the owner of premises has leased them, not as an entirety to one individual, but in separate apartments to different tenants, and has reserved, among other portions of the premises, the common ways of passage to the yard, these ways still remain in his possession, and he is bound

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to maintain them in a safe condition. *Dowd v. Fitzpatrick*, 18 Weekly Dig. 343.

Such a case is not controlled by the general principle that the landlord is not bound to repair except by special contract. The hallways, stairways, platforms, exits and entrances were not rented, but were used in common by all the tenants. The latter have an easement over the same, but as they were not rented, the duty rested on the landlord to keep them in repair. *Id.* The tenants may invoke the principle of law, which binds the owner of real property to use care and diligence to keep the premises in safe condition for the access of persons who come thereon for any purpose beneficial to him. *Id.*

In *Doupe v. Genin*, 45 N. Y. 119, an action was brought to recover damages for injuries to the plaintiff's goods and loss to his business from the omission of the defendant to repair the roof of the premises occupied by the plaintiff. The defendant demised to the plaintiff, to be used in carrying on the upholstery business, the store and basement, except the right to the other tenants to use the basement stairs, of certain premises in the city of New York. The lease contained no covenant on the part of the landlord to repair, but did contain a stipulation that, if the premises should be so damaged by accidental fire as to make them untenable for more than thirty days, the rent should cease, at the option of the tenant, until the same should be repaired. The upper part of the building was under lease to another tenant who was in occupation. During the term, a fire broke out in an adjoining building, and spread to the building in question, and destroyed the greater part of the roof and the upper portion of the building, though the portion leased to the plaintiff was uninjured. The defendant without delay commenced to restore the building, but during the work the plaintiff's goods were damaged, and he claimed that he had suffered in his business. And it was held that, where a building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant unless he has expressly covenanted to do so; and that this rule applies as well to a tenant who has hired a portion of the building which is not directly injured by the fire, as to the lessee of the whole building or of the part destroyed.

In the absence of a contract, there is no principle upon which a party can be held bound to erect any structure for the purpose of protecting his neighbor from the inclemency of the weather, or to replace any structure upon his own premises which has been destroyed, because while it existed it afforded such protection.

Statute of 1860.—In *Sheary v. Adams*, 18 Hun, 181, the landlord and tenant entered into a written lease for the occupation of certain premises. Said lease contained the following provision: "And the said party of the first part hereby agrees to keep the roof of the premises mentioned herein in good and suitable repair, so as not to affect the business of the said party of the second part." The defendant became surety for the payment of the

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rent. And it was held that chap. 345 of 1860, authorizing tenants to abandon premises if they become untenable, does not affect the common law rule requiring tenants to make ordinary repairs, and that, if through the tenants, neglect to make such repairs the premises becomes untenable, he cannot abandon them under the said act. If the landlord fail to perform his contract contained in the lease to keep the roof of the building in good repair, such failure, *per se*, would not constitute a defense to the tenant or his surety. If the premises, for such reason, became untenable, the tenant could abandon the premises, and from that time would not be liable to pay rent.

A parol promise to repair, made by the landlord, after the execution of the lease, is without consideration and void. *Davis v. Banks*, 2 Sweeny, 184; *Speckles v. Sax*, *ante*; *Gottsberger v. Radway*, 2 Hilt. 342. See *Flynn v. Hatton*, 43 How. 333; 4 Daly, 552.

But where the landlord, by a subsequent agreement made upon sufficient consideration, contracts to keep the premises in repair, he is bound to do so and is liable in damages for a breach thereof. *Post v. Vetter*, 2 E. D. Smith, 248; *Oettinger v. Levy*, 4 Id. 288.

In *Jeffers v. Bantly*, 47 Hun, 90, an action was brought to recover rent. The defendants admit the rent, but claim that, subsequent to the execution of the lease under which rent became due, an oral contract was made between the parties, by which, in consideration of the payment by the lessees of five dollars a year more than the rent specified in said lease, the lessors agreed to make all necessary repairs on the demised premises, or to permit the lessees to make such repairs and to deduct the cost thereof from the rent reserved. Subsequent to such oral agreement, the lessees necessarily expended an amount, in making necessary repairs, in excess of the rent to recover which the action was brought. The written lease was for a term of three years. The lessees did not receive notice from the lessors of any intention on their part, prior to the time of the making of such repairs, to rescind such oral agreement. And it was held that they were entitled in this action to offset moneys, actually expended upon the faith of such oral agreement, against the rent reserved by the lease.

Damages.—Where the tenant suffers from the landlord's breach of his contract to repair, he has two remedies, either to do the necessary repairs himself and off-set the cost against the rent, or to show the difference in value between the premises as they were, and as they would have been if properly repaired. Such difference of value would have been damages which could have been set up by way of counterclaim.

It was held in *Rosenbaum v. Gunter*, 3 E. D. Smith, 203, that, where a landlord agrees to allow a tenant for repairs, an expenditure for that purpose, is, in effect, a payment on account of the rent.

In *Dutton v. Holden*, 4 Wend. 643, it was held that, the landlord, under a reservation of the right to enter and make repairs and alterations, cannot

justify the destruction of a fence, which leaves the premises exposed to the intrusion of cattle.

And where a lease reserves to the lessor the right to enter and make repairs, he is not liable for any damages resulting from its exercise, unless the work was performed in a wanton, unskillful or negligent manner. *Turner v. McCarthy*, 4 E. D. Smith, 247; *White v. Mealio*, *ante*.

In *Myers v. Burns*, 35 N. Y. 289, an action was brought for rent on a lease by the grantee of the reversion against the assignee of the term. The defense was a counterclaim, under a covenant of the landlord to keep the premises in repair, for \$908, expended by the tenant in repairs, and for \$700, damages occasioned by the loss of the use of four rooms, alleged to be untenable for the want of repairs. The tenant made the repairs, in so doing, certain portions of the wood-work of the hotel were repainted with zinc paint, which was about fifteen per cent more expensive than common lead paint which was the original style of painting, and was more durable and more ornamental.

It was held that the landlord had the option of making these repairs by his own mechanics, and with such suitable materials as he should select. His omission to do so, gave the tenant the right to make them by his mechanics, and with such suitable materials as he should select. The latter was bound to be reasonable and judicious in his repairs; but he was not compelled to select precisely the same kind of paper or paint, or to be precise that the expense was not a farthing greater than had before been expended upon the same spot. He was at liberty to repair according to the modern style, and adopt modern improvements.

In this same case, it appeared that, during some portion of the term, four rooms in the hotel were of no use to the tenant. When fires, were kindled in them, the flues would not draw, but the gas and smoke issued out into the rooms, rendering them uninhabitable. The premises in question were leased as a first-class hotel, and the lessor had covenanted to keep the said hotel and premises in good necessary repair during the term, at his own proper charge and expense. And it was held that the rooms of a hotel were not in good repair for such a purpose, when they were so smoky that they could not be occupied; or when the coal gas issued at all times from the lighted grate and filled the room with its noxious substance. No tenant or occupant could inhabit such rooms when a fire was needed. A house or a room which cannot be comfortably and safely inhabited, is not in good repair. A room in a first-class hotel, where women and children usually form portions of a family, cannot be tenantable or in good repair, unless a fire can be had when desired.

It is not important, either to the tenant or landlord, whether such defects in the flues are caused by delapidation or arise from original misconstruction. The rooms are equally untenable and uninhabitable in either case; and they are equally out of repair, from which cause the difficulty may arise. If the landlord agrees to keep in repair, and if, to keep in repair, it is necessary that the rooms should first be put in repair, he is bound to per-

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form that duty. Where there is no covenant that the rooms be kept in their then condition of repair, or no exception of natural wear and decay, the fair intent of the agreement is that they shall be kept in good repair and good condition at all times.

Where the leased premises have been rendered untenable by water from the roof, it would not be an answer to a request to repair that the leak existed when the lease was executed. Nor, if the ceilings had fallen, or the rooms were filthy from dirt and want of paint, will it be an answer that they were in that condition at the time of making the lease. The condition of the covenant to keep in repair, can only be performed by first putting in repair, when that is necessary. See *Beech v. Crain*, 2 N. Y. 86; *Myers v. Burns*, *ante*.

Where the landlord covenants to repair, and fails to do so, the tenant has two different remedies, of either of which he can avail himself, in case he has given due notice to the lessor to repair. He can make the repair himself and call upon the landlord to refund the expense; or he can call upon the landlord to take the ordinary responsibility of a party failing to perform his contract, to wit: to pay the damages caused by such failure. In the former case, the rule confines the damages to the actual expense, if no special damage is shown; but in the latter, the cost of the repair is not an element in the case. It is as though there was no such right to repair, on the part of the lessee, but the claim rested solely in damages.

In *Cook v. Soule*, 1 N. Y. S. C. 116, an action was commenced to recover money claimed to be due from the tenants for the rent of a certain building occupied as a livery stable. The tenants set up, by way of counterclaim, damages sustained by them by reason of the landlord's neglect and refusal to perform his covenant to keep the premises in good and sufficient repair during the term. The tenants made some partial repairs and gave evidence, against objection, as to the damages sustained by their property on the premises in consequence of the breaking down of the floor from the rottenness of the joists and also from leakage. And it was *held* that under such agreement to repair, the tenant may either repair and recover the expense, or recover damages sustained by him for failure to repair; that a lessee, by making partial repairs, does not bar a recovery for damages sustained before making such repairs, or for those sustained by defects not embraced in the repairs.

It was held, in this case, that the measure of damages, in case of a breach by the lessor, may be either the amount of damage done to the property of the lessee, or the difference between the value of the premises as they were and their value if in good repair.

On an appeal of this case to the court of appeals, in 56 N. Y. 420, the appellate court repudiated the former part, and sustained the latter portion of this rule.

In this case an action was brought by the lessor to recover a balance claimed to be due for rent of certain premises occupied by defendants as

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tenants. The defense was a counterclaim for damages, alleged to have been sustained from a breach of an agreement on the part of the lessor to put and keep the premises in good repair. The premises were used for a livery stable. The roof leaked during the term, by means of which the tenant's property kept in the building was from time to time more or less injured. The tenants knew of the leaky condition of the roof. And it was held that a tenant whose landlord has agreed to put the premises in repair but has failed to do so, knowing that his property will be exposed to injuries from storm, or otherwise endangered, if left upon the premises, has no right to take the hazard; and if he does and his property is injured, he cannot recover of the landlord therefor. In this case, as the tenants knew of the leaky condition of the roof, they did not recover for any injury to their horses, carriages and other property left in the building, by getting wet, by reason of such defect. It was the duty of the tenants to protect their property from such dangers.

Where the landlord covenants to repair, and fails to keep his agreement, the tenants are entitled, as damages therefor, to the difference between the value of the premises as they were and as they would have been, had they been kept in repair. There may be exceptions to this rule. *Cook v. Soule, ante*. In cases where the requisite repairs are trifling, and the damages by not making them are large, it is the duty of the tenant to make them and charge the landlord with the cost. See *Miller v. Mariners' Church*, 7 Green, 57; *Laker v. Damon*, 17 Pick. 284. In such case, the tenant, after giving reasonable notice and opportunity to the landlord to make the repairs, if he neglect, may himself make them, and charge the landlord with the expense.

In *O'Connor v. Goureaud*, N. Y. Com. Pl., Dec. 6, 1886, an action was brought upon a written lease to recover a balance of rent, which was admitted to have been unpaid. The lessor agreed to make all necessary repairs to the building. He was requested to repair the premises, and sent a mechanic to make repairs upon each occasion when he was notified, and even insisted upon a guarantee from the roofer that the roof was good for two years.

Under the covenant in the lease in question, the authorities seem to agree that damages for its breach must be those which were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. If the landlord fails to repair agreeably to his covenant, the tenant may make the repairs at the landlord's expense, and charge him with the diminished value of the premises in consequence of the want of it. *Id.*; *Myers v. Burns, ante*; *Cook v. Soule, ante*.

But the tenant is not entitled to recover the amount of his loss from the landlord, without regard to what it would have cost to make the repairs. *O'Connor v. Goureaud, ante*.

If the repairs may be made at a trifling cost, the tenant cannot leave it

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undone, and charge the landlord whatever damage may be done to his goods in consequence of not repairing, without limit to the amount. He cannot neglect reasonable efforts to protect himself and his landlord from injury and loss, nor can he reap any advantage from his own negligence, in a case where no claim is made on the part of the tenant, that the repairs were negligently made by the landlord, but only that the latter failed and neglected to perform his covenant.

In *Walker v. Swayzee*, 3 Abb. 138, the landlord undertook to make repairs, but did them in an insufficient and improper manner, and damages were allowed against him on the ground of negligence on his part.

The measure of damages in an action on a covenant to repair on the part of the landlord was held, in this case, to be the amount it would cost to make such repairs; and that the tenant cannot, by exposing himself, his family or his goods to the injuries or damage which result from the landlord's neglect, present a meritorious claim, when he can remedy the evil by repairs for which he will be fully indemnified out of the rental.

In *O'Connor v. Gouraud*, N. Y. Daily Reg., April 17, 1886, it was held that the amount of damage caused by rain to a tenant's goods by reason of a breach of the landlord's covenant to repair, was not recoverable, where it did not appear that the tenant had made any effort to make such repairs himself.

In *Walker v. Gilbert*, 2 Robt. 214, it was held that a subsequent promise by the lessor to repair was not broken, except by a neglect to perform it after the lapse of sufficient time for that purpose.

In *Chadwick v. Woodward*, 13 Abb. N. C. 441, it was held that a lessee, by entering and continuing in possession until the end of the term, waives any claim for damages arising from a lessor's failure to fulfill a condition of the lease that he shall, at its commencement, put the premises in repair; that in any event he can only recover the amount actually expended by him in making the repairs required.

Where a lessor rents a stall, from month to month, for the purpose of keeping a horse, and, on being informed of a defect in the floor, promises to repair it, but neglects to do so, he is liable in damages for an injury resulting from such non-performance. *Johnson v. Dickson*, 1 Daly, 178. See *Flynn v. Hatton*, *ante*.

In *White v. Mealio*, 63 N. Y. 609, a promise to compensate the tenant for the injury sustained, during the progress of repairs, was held to be binding, notwithstanding the reservation of a right to enter for the purpose of making necessary repairs.

In *Beach v. Craine*, *ante*, the defendant had covenanted to erect and maintain a gate, between the public highway and plaintiff's land, across or over a private road granted him; and on default he was held liable for actual injury occasioned by cattle coming on to the land, in consequence of the removal of the gate.

In this case, the erection and maintenance of the gate were specially

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contracted for, and its sole object was the protection of the land from such inroads of stray cattle from the highway; and the damages were properly held to result as a direct consequence of the breach.

In *Flynn v. Hatton*, 43 How. 333, the landlord by agreement was to make such repairs as were needed to keep the demised premises in tenantable condition.

Under breach of such a contract, the landlord is only liable, and so it was held in this case, to the tenant for such damages as naturally and according to the usual course of things arise from the breach, or which may reasonably be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its breach, but not for accidental, remote or consequential causes. It was stated in this case that the natural and ordinary damages for the breach of a general agreement to keep the premises in repair, are the expenses of repair and the loss of the use of the premises, while the lessor was in default or during the making of the repairs; and that it could not be contemplated that any special risk or accident resulting from any particular defect, or likely to occur from decay or want of repair in any particular part of the premises, was considered; and, least of all, that it was likely the parties anticipated or had in thought or design, that the tenant, with full knowledge of the rotten or unsafe condition of any part of the premises, would expose himself, his wife, children or servants to any danger that might be threatened, of which he had full knowledge, and might avoid; or that it was the intention of the agreement that he or any member of his family should be insured or indemnified against all possible contingencies or casualties resulting from want of perfect repair in every portion of the premises.

The mere agreement to repair has reference only to the condition of the building or premises demised, for the purpose of their profitable use, and the pecuniary benefit to be derived from their enjoyment or lost from being deprived of their use in such state of repair as the agreement intended. *Flynn v. Hatton*, *ante*.

Such an agreement or contract in no way contemplates any destruction of life or casualties to the person or property of any one, which might accidentally result from an omission to fulfill the agreement in every respect.

But for the proposition that a landlord under contract to keep the premises in repair is for breach, also further liable to his tenant as in tort for willful refusal or neglect to perform his obligation, no warrant can be found in principle or authority. Nor does a subsequent parol promise, after being notified of defects, to make the necessary repairs, unless founded on a new consideration, superadd anything to his original obligation. See *Doupe v. Genin*, 37 How. 5; nor does it furnish any ground for awarding additional damages except so far as the tenant is by such promise delayed and hindered in making them at his own expense. *Flynn v. Hatton*, *ante*; *Turner v. McCarthy*, *ante*.

In *Ward v. Kelsey*, 42 Barb. 582, the defendant leased to the plaintiffs certain premises consisting of warehouses, together with the improve-

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ments thereon and the pier extending in front thereof, for a given term at a certain specified rent. He, in and by said lease, agreed that he would do all necessary repairs upon said premises and pier within a reasonable time after notice to him by the plaintiffs, requiring him to do so. While the plaintiffs were in possession of the premises, under the lease, the hoist-wheel was out of order, and they notified the defendant to put it in order, or they would do it. He refused to do it, and the plaintiff's thereupon caused the hoist-wheel to be repaired at their own expense. They afterwards brought this action to recover costs of such repairs and the damages they sustained during the time the repairs were being made. And it was held that the lessees were entitled to recover from the lessor all moneys expended by them in making necessary repairs, upon the lessor's neglecting to make the same, after due notice; but that they could not recover damages for the interruption to their business occurring while the repairs were being made, as such interruption would be no greater than if the repairs had been made by the lessor. The obligation assumed by the lessor, to make the repairs, gave him the right to interfere with the lessee's enjoyment of the property, so far as the making of such repairs rendered it necessary, and the lessees cannot complain of any injury resulting from the performance of that obligation. The case is not altered by the fact that the lessor failed to discharge his duty in this respect, and that the lessees themselves, in consequence thereof, made the repairs needed.

In *Hexter v. Knox*, 63 N. Y. 561, plaintiff leased of defendant a hotel in the city of New York and certain adjoining premises. The defendant covenanted in the lease to tear down the old building and erect a new building on the adjoining premises to be used in connection with the hotel. The new building was to be completed, and plaintiff put in possession thereof, by a specified time. Plaintiff was then occupying the hotel and the building upon the portion of the adjoining premises under a former lease. He removed the furniture from said building and stored it while the new building was being erected. Defendant failed to complete the new building within the specified time. The plaintiff, in an action to recover damages for breach of the covenant, was held to be entitled to recover the rental value of the use, for hotel purposes, of the rooms in the new building during the time he was deprived of such use by defendant's default; and as to such of the rooms for which plaintiff had the furniture, he was entitled to the value of their use as furnished rooms.

Where a landlord covenants in his lease to make certain repairs, the tenant may, in case of a breach of the covenant, make the repairs and charge the expense to the landlord, but he is not bound to do so. If the landlord has due notice of their condition, he has no right to cast upon the tenant the responsibility and the burden of repairs which he was bound to make.

In *Dorwin v. Potter*, 5 Denio, 806, the plaintiff leased to the defendant

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a farm together with a number of cows, young cattle and swine and certain farming utensils, and agreed that the barns on the premises should be put in good order. The roofs of some of the barns were leaky, and some of them had bad floors. An action was brought for non-payment of rent and other breaches of the provisions of the lease. The defendant gave notice of set-off, and recoupment of damages, on account of the plaintiff's failure to put the barns in good order according to his agreement. And it was held that the damages which the lessee was entitled to recoup in such action were the amount it would cost to put the barns in repair, and not the detriment which he suffered by their remaining out of repair during the term. He was not entitled to all the damages which he might have sustained by injuries to the cows and the young cattle, the increase of food required, and the decrease of produce by reason of the condition of the barns. Such damages are altogether too remote and contingent.

Liability for condition.—In *Kabus v. Frost*, 50 Super. Ct. 72, it was held that there is no implied warranty or obligation on the part of a landlord that the premises are in a safe condition for use, or that they will not become unsafe, and no general obligation to repair.

If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. *Ahern v. Steele*, 115 N. Y. 203.

When an owner demises premises and covenants to repair, the covenant cannot inure directly to the benefit of a third person not a party thereto. But in such case, the third person injured, because, for want of repairs, the demised premises have become a nuisance, has a cause of action against the tenant. And because the tenant, in case of a recovery against him, could sue his landlord for indemnity upon the covenant, the person injured, in order to prevent circuitry of action, may bring his action against the landlord, not because the landlord owed him any duty to repair, but because he owed that duty to his tenant. If the owner of demised premises has let it without reserving any right to go upon it for repairs, and even if he could not have gone upon it for repairs without being a trespasser, it does not affect his liability for a nuisance existing thereon.

It was held in *Clancy v. Byrne*, 56 N. Y. 129, that a lessee, who has covenanted with his landlord to repair, is not responsible to a stranger for a nuisance upon the demised premises while in the possession of a sub-tenant to whom he had let them. In this case, the lessee had made no covenant to repair with his sub-tenant, and was not bound to indemnify him; and, therefore, the party injured could not maintain an action against him, though the latter had covenanted with his landlord to repair. In cases where it is said that a landlord is bound to make repairs upon demised premises is responsible for a nuisance thereon, the obligation to make the repairs was one existing between him and the tenant.

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In *Sterger v. Van Sichen*, 55 Hun, 606, an action was brought for injuries sustained while upon defendant's premises. Defendant was the owner of a house which was occupied by a tenant. The plaintiff while visiting the tenant went upon the back stoop of the demised premises and was injured by the breaking of a portion thereof. The tenant had agreed to repair the stoop prior to the accident, and the defendant had allowed for such repair by a deduction from the rent. And it was held that, as between the tenant and those claiming under him, no action would lie against the landlord for injuries occasioned by such defect. The duty to repair, by virtue of the agreement, was assumed by the tenant.

A lessor of buildings, in the absence of fraud, or any agreement to that effect, is not liable to a tenant, or others lawfully upon the premises by his authority, for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they were apparently intended. *Jaffe v. Harteau*, 56 N. Y. 398; *Cleves v. Willoughby*, 7 Hill, 83; *O'Brien v. Capwell*, 59 Barb. 497.

The lessor of premises, demised in a ruinous state, may not shield himself from liability to strangers, for damages resulting from their defective condition, by taking from the lessees a covenant to keep the premises in good order and repair. *Swords v. Edgar*, 59 N. Y. 28.

A person, injuriously affected by the ruinous state of the premises demised, has no right nor privity in the lessee's covenant to repair. He is not given thereby a right of action against the lessee greater nor more sure than he had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. A person, on whom there rests a duty to others, may not, by an agreement solely between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill it will not relieve him. A covenant taken from a lessee, to keep in order and repair, is no more effectual than a contract with a builder to do all that is needful to make the premises secure for all comers. Both may afford an indemnity to the lessor, but neither can shield him from liability.

As between landlord and tenant, when there is no fraud or false representations or deceit, and in the absence of an express warranty or covenant to repair, there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in safe condition for use. The principle of *caveat emptor* applies to all contracts for the letting of property, real, personal or mixed, as much as to contracts of sale, with one or two recognized exceptions. *O'Brien v. Capwell*, *ante*; *McGlashan v. Tallmadge*, 37 Id. 314; *Cleves v. Willoughby*, *ante*; *Howard v. Doolittle*, *ante*.

In *O'Brien v. Capwell*, *ante*, there was no covenant on the part of the

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landlord to repair. The tenant knew the condition of the premises and that they were out of repair at the commencement of the lease. And it was held, in an action to recover damages by the tenant's servant by reason of a want of repairs, that, as the lessor was under no obligation to repair the premises, and their condition was equally well known to the tenant as to him, there was no basis for an action of negligence, by the tenant, or any servant of his, or person standing in his place arising out of the fact that they were out of repair.

WILLIAM F. LENNON, Appellant, v. MARY A. STILES,
Respondent.

Supreme Court, First Department, General Term, March 24, 1889.

1. *Specific performance.*—In actions for the specific performance of a contract to exchange real estate, it is discretionary with the court to grant such relief; and where, for any reason, the enforcement will be against conscience and justice, it will be refused.
2. *Same. Evidence.*—In such an action, a conversation between defendant's agent, who negotiated the contract, and a proposed purchaser of one of the houses which plaintiff was to convey to defendant, in the absence of plaintiff, is entirely competent for the purpose of showing the circumstances under which the contract with such purchaser was made, and the inducements which led thereto, as a part and parcel of the whole transaction.
3. *Same.*—So also, evidence showing the condition and circumstances under which the contract was to be delivered, and what was said to induce defendant to sign it, is competent.
4. *Same. Finding.*—A finding that plaintiff had a desk with a certain firm is warranted, when a member of the firm so testifies, and it appears that the plaintiff had a sign at the firm's office.
5. *Appeal.*—The admission of immaterial testimony, which does the appellant no harm, is no ground for granting a new trial.

Action for specific performance of a contract by defendant to exchange a house and lot with plaintiff for two houses and lots. Complaint was dismissed.

Appeal from judgment on dismissal of complaint.

The following opinion was rendered on dismissal of complaint:

INGRAHAM, J.—In actions for the specific performance of a contract to convey land, granting the relief asked for, rests in the discretion of the court, and if for any reason the contract is unfair or unreasonable, or in consequence of the relation of the parties to the contract, or the circum-

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stances of the case, an unfair advantage has been taken, or where, for any reason, the enforcement of the contract would be against conscience and justice, specific performance will be refused.

Thus, in *Seymour v. Delancy* (3 Cowen, 521), SAVAGE, C. J. states the rule to be :

“ That on the question of decreeing specific performance of executory contracts, the court of chancery must exercise its discretion ; not an arbitrary, but a sound judicial discretion. If the contract be free from objection, it is the duty of the court to decree performance. But if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground, the court may refuse its aid to enforce the contract, and leave the parties to contest the right in a court of law.” And SUDAM, senator, says : “ I also admit that the party claiming the specific performance must present a case fair, just and reasonable ; that the contract must be founded on adequate consideration, and it must be free from fraud, misrepresentation, deceit or surprise.”

And this rule has again and again been reiterated.

In *Peters v. Delaplaine, et al.*, CHURCH, J., says : “ The granting or withholding specific performance is within the discretion of the court. It will not be granted where it would be against conscience and justice to do so.” And in *Margraf v. Muir* (57 N. Y. 158), EARL, commissioner, says : “ When a contract for the sale of land is fair and just, free from legal objection, it is a matter of course for courts of equity to specifically enforce it. But they will not decree specific performance in case of fraud or mistake, or of hard or unconscionable bargains, or where the decree would produce injustice, or where such a decree would be inequitable under all the circumstances.”

In this case, a widow in feeble health was spending the summer in Massachusetts. She was the owner of real

estate in New York, and depending upon the income of her property, including the premises in question, for her support.

A broker suggested to her son-in-law, Cornwall, the exchange of the property, for which the contract in question was subsequently made, with the knowledge of the defendant. Cornwall and the plaintiff then commenced the negotiations that led up to the contract in question.

The controlling desire of Cornwall appears to have been a desire to get some money for the defendant out of the exchange, and in order to carry out that intention it was necessary to get a purchaser for one of the houses which plaintiff was to convey to the defendant. The firm of Darling & Schwannecke then appeared with a Mr. Stern as a purchaser of one of plaintiff's houses, for \$23,500. Stern signed a contract to purchase at that price, which was deposited with the firm of brokers in escrow, and at the same time Stern deposited \$250, as the amount to be paid in cash on the execution of the contract. This apparently being satisfactory to Cornwall, he took the contract in question and the contract with Stern to the defendant, in Massachusetts. He stated to her that one of the houses could be sold for \$23,400, and that the other was rented for \$1,500, and finally induced her to sign the contract, she directing him not to deliver the contract in question until the money to be received by her for the house that she was about to sell to Stern was actually paid. Cornwall then came back to New York, met the plaintiff and Stern at Darling & Co.'s office, and there finally delivered the contract to Stern, and the plaintiff paid \$350 on the contract, most of which was at once appropriated by Darling & Co., for their commission.

Neither of the plaintiff's houses were, in fact, rented, and it is evident that Stern never had the slightest idea of completing his contracts, or even made the slightest effort to have the title examined, or to do anything about it. The

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whole circumstances surrounding the transaction are extremely suspicious. The evident incapacity of Cornwall to conduct such a negotiation, the connection between the plaintiffs and the brokers who acted for Stern, the admission by the broker that he went to Cornwall about Stern at the plaintiff's suggestion, the action of Stern after he had signed the contract, and many other facts, tend strongly to show that there was a combination between the plaintiff and Darling & Co., to get possession of defendant's property; but, without expressly deciding that question, that there was such a fraud as would be a defense to an action at law, it is evident that this is not such a contract as the court, in the exercise of its discretion, should specifically enforce.

Considering the circumstances of the case, the exchange was a very unfair one. Plaintiff's houses were not rented, and were producing nothing, although largely mortgaged.

Defendant's house was well rented, producing a good income; and I am satisfied that plaintiff's houses were not salable at anything like the price at which they were exchanged. Plaintiff knew well the condition of the property, and it is evident that he took advantage of Cornwall's evident incapacity to get from the defendant a contract that had she been acquainted with the circumstances, she never would have signed.

Applying the rule above stated, I think it is the duty of the court to refuse specific performance, and leave the plaintiff to his remedy at law.

The equitable relief being denied, according to our practice, the action may be held to enable the plaintiff to continue the action to recover his damages at law. *Fitzpatrick v. Dorland*, 27 Hun, 294. Or, if the plaintiff desires, a judgment will be entered dismissing the complaint, without costs.

E. L. Spink, for appellant.

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Robert B. Alling, for respondent.

VAN BRUNT, P. J.—An examination of the evidence in this case shows that the conclusion arrived at by the court below, that it would be inequitable to decree a specific performance of the contract upon which this action is founded, was entirely correct, for the reasons stated in the opinion of the court below, and it is not necessary in the disposition of this appeal to rehearse the grounds which have been so well stated in that opinion.

It is necessary, however, to consider some exceptions which were taken and which are pressed upon our attention upon this appeal.

Objection was taken to the evidence offered in regard to an interview with Mr. Stern, a proposed purchaser of one of these houses, when the plaintiff was not present.

This conversation was entirely competent for the purpose of showing the circumstances under which the contract with Stern was entered into, and the inducements which led thereto. It was part and parcel of the whole transaction, and whether the plaintiff was present or not was entirely immaterial, as it was competent to show the circumstances under which the plaintiff or her agent acted.

The evidence as to the conversation between Mr. Cornwall and the defendant was entirely competent, as the defendant had a right to show what was stated to her at the time of her signing this contract, for the purpose of inducing her so to do, and the instructions that she gave in regard to its delivery. Merely because a person is entrusted with a contract which has already been signed, does not necessarily show that he is authorized to complete the execution of it by delivery, and the defendant had a right to show that Mr. Cornwall had no right to deliver the contract, or under what circumstances he was authorized so to act.

The conversation with Mr. Stern, to which the next exception is pointed, was entirely immaterial, but it did the

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plaintiff no damage and is no reason for the granting of a new trial.

The defendant had a right to show what the houses cost, and what rent was procured, for the purpose of giving to the court some idea of the value of the premises, which was an important consideration, in view of the circumstances which surrounded the entering into this contract.

The exception to the fourth finding of fact, that Cornwall declined to receive an offer for an even exchange of property, is not well founded.

It is urged that Cornwall swears to having only told Mr. Thain this fact, and Mr. Thain nowhere testifies that he told the plaintiff anything of the kind. But it appears from the evidence that Mr. Thain in this transaction was entitled to act as the agent of the plaintiff, and the evidence clearly was sufficient to support the finding.

The fifth finding, to which exception is taken, that in order to induce Cornwall to enter into the contract he made certain statements, is evidently supported by the evidence, because as already stated Thain was the agent of the plaintiff, and was authorized by the plaintiff to make representations in respect to this property; and this evidence seems to have been ample to justify the court in making the finding.

The criticism in regard to the language of the finding, in that it states that the plaintiff represented that he had frequently been offered \$23,500 apiece for the houses, and had frequently refused the same, may have more foundation in fact, because the evidence is not distinct upon this point that the plaintiff stated he had been more than once offered \$23,500 apiece for the houses and had refused the same, although the evidence shows that Mr. Thain, the plaintiff's agent, represented to Cornwall that the plaintiff had told him that he had been offered \$23,500 for one of the houses, and it appears also from the testimony that the plaintiff swore that he had had several offers of this kind and refused

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the same. It is immaterial to the force of the finding whether the plaintiff represented that he had one such offer or several. The balance of the finding is certainly sustained by the evidence, both of Thain and Cornwall.

It is true the plaintiff denies the representation, but the probabilities seem to be in favor of the truth of the finding.

The sixth finding to which exception is taken, that the plaintiff had a desk with Darling & Schwannecke, is also supported by evidence, Mr. Schwannecke swearing distinctly that the plaintiff had desk room in their office, and it appears conclusively that he had a sign there.

If the counsel had read the evidence in this case he would not have made the statement which appears in his brief, that this portion of the finding is absolutely unsupported by any evidence, and that it was simply imported from an unverified answer. Counsel, in the preparation of their points upon facts, should be a little more careful in making strong statements of this kind, which are contrary to the truth.

The seventh finding excepted to is amply supported by the proof.

The conclusion in the eighth finding that Stern was put forward as a *bona fide* purchaser, when in reality he was not, was a fair deduction from the evidence. The ninth finding is also equally well sustained; and the tenth, eleventh and twelfth findings may also fairly be derived from the evidence.

There is nothing in these exceptions which would call upon the court to reverse the judgment.

The defendant's agent, beyond question, was allured into making this contract by the holding out by the plaintiff and his duly authorized agent of inducements which could not be realized, and thus induced to enter into this inequitable contract which it is sought now to have specifically performed, and also to violate the instructions expressly given to him in regard to the delivery of the contract, which he

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was bound to obey, and which affected his authority to act as the agent of the defendant. The judgment should be affirmed, with costs.

CULLEN, J., concurs.

THEODORE W. BAILEY *et al.*, Respondents, v. ABIAL A. PRINCE *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Arrest. Vacating.*—An application to vacate an order of arrest founded on facts not extrinsic to the cause of action, is to be disposed of according to the just preponderance of proof as contained in the affidavits read on such motion, and a decision as to defendant's liability to arrest ought not to be postponed until the trial.
2. *Same.*—In case of an arrest on the ground that the defendant has removed or disposed of his property with intent to defraud his creditors, a motion to vacate the order of arrest is properly refused, where it appears that a chattel mortgage given by defendant to his brother was foreclosed under very suspicious circumstances, and no statement from the purchaser at the foreclosure sale, showing the good faith of the transaction, is presented.

Appeal from an order denying a motion to vacate an order of arrest.

Gurden D. Shrauder, for appellants.

T. C. Campbell, for respondents.

BARTLETT, J.—The right of the plaintiffs to recover in this action depends upon their ability to prove that the defendants removed or disposed of their property with intent to defraud their creditors. Code Civ. Pro., § 549, subd. 4.

The court below held that the question of fraud should not be passed upon in advance of the trial, except in a clear case; and the view thus expressed is sanctioned in *Welch v. Winterburn*, 14 Hun, 519, and *Peck v. Lombard*, (22

Hun, 63, where it was held that an order of arrest, based on the nature of the action, should not be vacated upon affidavits tending to disprove the existence of the alleged cause of action.

In the present case, the cause of action primarily arises out of the breach of the defendants' contract to pay for the goods which they purchased from the plaintiffs; but proof of this breach would not suffice of itself to sustain a verdict in the plaintiffs' favor. They must go further and establish the fraudulent removal of the defendants' property, or they must suffer defeat in the suit. The element in their alleged cause of action, which renders it possible for them to maintain this particular suit, is the averment that the defendants have removed or disposed of their property with intent to defraud their creditors; and, therefore, the facts on which the order of arrest is granted cannot properly be regarded as extrinsic to the cause of action.

The doctrine which finds support in *Welch v. Winterburn* and *Peck v. Lombard* (*supra*), however, has not uniformly been acted upon in this court, and the better rule seems to be that indicated by Mr. Justice DANIELS in *Liddell v. Paton* (7 Hun, 195), to the effect that, even in a case in which the facts constituting the cause of action are identical with the facts constituting the cause of arrest, the court should dispose of an application to vacate the order of arrest according to the just preponderance of proof as contained in the affidavits read upon such motion, and a decision as to the defendants' liability to arrest ought not to be postponed until the trial. But, applying that rule to the case at bar, and assuming that the court below was bound to decide the motion upon the merits, I am not satisfied that it was erroneously denied.

Numerous acts of the defendants are proved, and, indeed, admitted, which might well and justly excite the suspicion of the plaintiffs, and which certainly called for explanation on the part of the defendants. The foreclosure of the chat-

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tel mortgage, the short time occupied by the sale thereunder, the transportation of goods to New England in an unpacked condition, and the removal of others from the defendants' premises, late at night, were circumstances that would naturally give rise to inquiry by the plaintiffs. Such inquiry, in the light of the statements made to them by the witnesses, whose affidavits they produce, indicated that the property of the defendants had been fraudulently removed. The denials and explanations by and in behalf of the defendants, meet many, and, perhaps, most, of the allegations satisfactorily, if the witnesses are to be believed; but, to my mind, their averment that the mortgage foreclosure sale was made in good faith, is seriously discredited by their omission to produce any affidavit by the alleged purchaser. The absence of any statement from him seems too significant, under the circumstances, to be overlooked, and leaves the preponderance of the proof with the plaintiffs.

The order appealed from should be affirmed, with costs and disbursements.

VAN BRUNT, Ch. J., and DANIELS, J., concur.

CHARLES G. MARTIN *et al.*, Respondents, v. HATTIE W.
BLISS, Appellant.

Supreme Court, First Department, General Term, May 24, 1889.

Brokers. Commissions.—Where, in an action by a broker for commissions for selling a house, he testified that defendant orally agreed to sell the house for a certain sum, and to pay him commissions on the sale, but defendant denied the agreement, and her testimony was corroborated by two disinterested witnesses; and it further appeared that, on the day after the alleged agreement, the defendant refused to sign a written contract of sale, and thereupon the plaintiff wrote her for a definite answer in regard to the sale, the evidence was held insufficient to establish the agreement and sustain a verdict for plaintiff, and the verdict was set aside and a new trial granted.

Appeal from a judgment entered on a verdict, and from an order denying a motion made upon the minutes for a new trial.

William J. Martin, for appellant.

C. N. Bovee, Jr., for respondents.

DANIELS, J.—The action was brought to recover the sum of \$600, with interest upon it, as commissions for obtaining a purchaser for premises owned by the defendant, and situated on Thirty-second street in the city of New York. It was alleged in the complaint that the defendant on or about the 12th of May, 1886, had employed the plaintiffs as her brokers, to sell the property for the sum of \$50,000, for which she agreed to pay them \$600. This was denied by the defendant in her answer, and the disposition of the action depended upon the ability of the plaintiffs to establish the truth of their allegations upon this subject. During the progress of the trial, exceptions were taken to the ruling

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of the court, and, also, as to portions of the charge under which the case was submitted to the jury. But these exceptions do not appear to have been well taken. And the disposition of the appeal is consequently left dependent upon the point whether the evidence established the agreement asserted to have been made by the plaintiffs.

The evidence given to support the making of the agreement was derived from the plaintiffs themselves. And it appeared from that evidence that they had been employed by Nathan Bozeman to purchase the property for him. He was willing to buy it for the sum of \$50,000. The evidence of the plaintiff, Charles G. Martin, was first taken in the course of the trial, and he stated that the defendant, when he called to see her upon the subject, on the twelfth of May, stated that she had made up her mind to sell the house, if she could get \$50,000 for it, but would not take a cent less than that sum.

The other plaintiff testified that he called upon her in the afternoon of the same day, and in the course of an interview had with her upon this subject, that she informed him that she would sell the place to Dr. Bozeman, for this sum of money. That a further conversation took place concerning the commission which should be paid to the plaintiffs in case a sale of the property for this amount took place, and in the course of which she finally promised to give the witness a check for \$600 commission, if he sold the place for this sum of \$50,000.

His testimony was that he communicated this fact to the purchaser, and on the same day drew a formal contract to carry the agreement into execution. This was presented to the defendant for her signature, after it had been subscribed by Bozeman, and she refused to sign it, disclaiming having made, or consented to any agreement whatever, for the sale and conveyance of the property. Her evidence directly tended to sustain the position taken by her in this manner concerning the transaction. And she stated the case as she

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said she understood it to be, and that was that she would sell the property to this purchaser, if she concluded to dispose of it for this sum of money. And that while the matter stood in this condition this suit was commenced.

By way of corroborating the evidence in this manner given by the defendant, Louisa McGrath testified that she heard a conversation between the defendant and Mr. Martin when Mr. Bozeman was in the building, in which the defendant stated to Martin, "Well, if I conclude to sell, I will let the coal go in for the same as I bought it for, and I presume the Baltimore heater also." Another witness, Patrick Henry Murphy, examined on behalf of the defendant, testified that he "heard Mrs. Bliss tell Mr. Martin that she would have nothing to do with him, that she hadn't made up her mind to sell the house at all, and if she did made up her mind she would let him know. She had made up her mind to do nothing about it yet. She hadn't thought of selling it." The next day this witness testified that Mr. Martin was there with some paper; that he did not know what it was. And the defendant then said, "Mr. Martin, I will have nothing to do with it. She said I have not agreed to sell the house, and there is no contract with me to sell." These two witnesses appear to have been entirely disinterested, and their evidence directly tended to support that given by the defendant, that she did not agree to sell this house to the person for whom the plaintiff desired to purchase it.

After the interview relied upon by the plaintiffs as establishing the making of the agreement, and the refusal of the defendant to subscribe the written contract for the sale of the property, the plaintiffs wrote a letter to her. This letter is in the following language:

NEW YORK, *May 14*, 1886.

Mrs. H. W. Bliss, No. 31 West Thirty-second street, City:

DEAR MADAM—We must have a definite answer in regard

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to the sale of your property, No. 31 West Thirty-second street, New York city, to Dr. Nathan Bozeman, to-day, by 2 o'clock P. M.

We have the contract signed by Dr. Bozeman for the purchase of the property for \$50,000, the time by which you agreed to sell, and his check for the deposit.

We shall be ready to deliver them until 2 o'clock to-day. Please give us a definite answer by that time.

Very respectfully,

MARTIN & BRO.

And it appears to contain the concesssion, on the part of the plaintiffs, that a definite answer had not been given by the defendant to them, for the sale of this property, prior to the time when the letter was written. If it had been, there was neither sense nor propriety in them asking her for a definite answer regarding the sale of the property to the doctor on the day of the date of the letter, by two o'clock in the afternoon. This letter, accordingly, is very decided evidence supporting the view of the transaction which the evidence, on the part of the defendant, had a tendency to maintain.

That which was given by Charles G. Martin established no agreement for the sale of this property to this purchaser, but, at most, tended to express a willingness on the part of the defendant to sell the place for \$50,000. But in that interview no reference was made to commissions, and it was stated, according to the relation of it given by the witness, to have been qualified by the expression, on the part of the defendant, that she would not take a cent less than the \$50,000 for the house.

As to whether a contract was made by her for the sale of the house to the doctor, and the payment of the \$600 commissions, the case depended entirely upon the testimony of William C. Martin, the other plaintiff. And the weight and effect of his evidence, concerning this alleged fact, was.

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wholly overcome by the denial of the defendant and the testimony of her two uninterested witnesses, supporting the truth of her denial. This left the oral testimony very slight, indeed, in favor of the plaintiffs, upon the trial, and with the effect of their letter of the 14th of May, 1886, balanced the scale entirely against them. Their case then stood disproved, and the jury, instead of finding a verdict in their favor, should have found it the other way. This was one of the grounds upon which the motion was made upon the minutes to set aside the verdict, and, under the circumstances presented by the case, an order should have been made disposing of the motion in that manner.

The order and the judgment should, therefore, be reversed, with costs to the appellant to abide the event, and an order should be entered setting aside the verdict, on the payment, by the defendant, of the costs of the trial.

VAN BRUNT, Ch. J., and BARTLETT, J., concur.

STEPHEN M. CHESTER, Respondent, v. FRANCOIS HENRY JUMEL, *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Assignment for creditors.*—An assignment of things which have no present actual existence, but rest in possibility only, is not against public policy, if fairly entered into, and, in such case, will be supported.
2. *Attorney and client. Compensation.*—Neither section seventy-three of the Code, nor section 6, 3 R. S., page, 970, prohibits an agreement to give an attorney a certain share of the proceeds for his services in collecting a claim.
3. *Same.*—The attorney, under such a contract, is entitled to a like share in the increase in value of the property.
4. *Same. Attorney's lien.*—An attorney has a lien for his services to the extent of his interest, upon the cause of action of his client.
5. *Equities. Conflicting. Parties.*—All the parties interested in a fund,

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where conflicting equities are required to be settled before its distribution can be made, must be brought before the courts, before a sale of the property, or distribution of its proceeds, will be directed by the judgment.

6. *Attorney and client. Mortgage security.*—It is no objection to the allowance of a certain sum, for services rendered at the attorney's request in relation to the property, from his share, that it was secured by a mortgage on his interest, nor need such mortgage be filed.
7. *Same. Contract to bear expenses.*—An agreement by an attorney to take measures for the recovery of property for his clients, for an interest in what should, by his efforts, be realized, and, for this purpose, to make expenditures and disbursements required for the recovery of the property by suit, when entered into in good faith, will be permitted and sanctioned.

Appeal from a judgment entered on a report of a referee.

Everett P. Wheeler and John J. Macklin, for appellants.

Douglass Campbell and Edward Winslow Paige, for respondent.

DANIELS, J.—The object of the action was to secure a sale and disposition of real estate, and the application of its proceeds, and of money already received, to the payment of assignments, and charges alleged to have been created against forty-seven and one-half per cent. of the property. It was a part of the estate of Stephen Jumel, who died in the city of New York, in 1832. He was the owner of property, situated upon, or near, Washington Heights; and the appellants, being his heirs, and residing in France, entered into an agreement with Charles Adolph De Chambrun, who, at the time, was solicitor of the French Legation in Washington, for the taking of measures to assert their rights to, and recover the property. The agreement was made on the 20th of April, 1876, and was accompanied with a power of attorney, both of which were executed by these heirs. By the agreement itself, they bound themselves to

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pay to Chambrun the sum of forty-seven and a half per cent. of all the gross sums which he should recover for the Jumel heirs.

And the agreement further stipulated that, "they henceforth give to the said De Chambrun a lien and a mortgage, to the amount of the sum of forty-seven and a half per cent. on all the property on which said Mr. De Chambrun shall establish the rights of the Jumel heirs.

"This share is attributed to him voluntarily and freely, as much for his having made known to them the existence of that estate, as for fees. And, also, to repay him for advances, disbursements, and whatever expenses he may have made, and should make, to bring about the recovery of the sums here above mentioned, of fifty-two and one-half per cent. (52½ per cent.) paid to the Jumel heirs, so paid out of all sums recovered before taking any sum whatever for expenses, fees, and disbursements."

This agreement was made between the heirs and De Chambrun, at Mont De Marsan, in France; and, soon after it was made, De Chambrun entered into an agreement with John A. Stoutenburgh, of the city of New York, by which, and in consideration of the premises, and in further consideration of the professional services of said Stoutenburgh, rendered, and to be rendered, the said De Chambrun, as the attorney in fact of said heir, and for himself and associates, hereby agrees to pay, or cause to be paid, to said Stoutenburgh, the sum of four per cent. (4 per cent.) on any and all proceeds of said property, real, personal or mixed, to be paid in cash or land, or in both cash and land, as the case may be, to the full extent of the property recovered.

And it is further, also, part of this agreement that the said sum of four per cent. (4 per cent.) is, under and by virtue of the power invested in said De Chambrun by the said heirs of the said Jumel, created and made a specific lien on the said property, all and every part thereof, and is to be paid as fast as proceeds, money or property shall be recovered, under

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and by virtue of the power conferred upon said De Chambrun, whether the same be by suit or compromise.

And in consideration of the premises, the said Stoutenburgh agrees to continue to give his advice, and all due and proper attention, to the prosecution of all suits and proceedings for the recovery of said property.

Stoutenburgh entered upon the performance of this agreement, and continued in its performance for such a period of time as entitled him to this share of the property, or its proceeds; and he assigned his right and interest to the plaintiff in this action, who instituted and prosecuted it for the enforcement of this agreement.

By way of defense, although not set up in the answers, the appellants objected that the agreement made between themselves and Chambrun was unlawful and incapable of being enforced under the statutes of this state.

But the objections presented for that purpose were overruled by the referee, who held the agreement to be lawful and capable of enforcement. It was not an agreement prohibited by section 73 of the Code of Civil Procedure, for it was not a purchase or an agreement with Chambrun, as an attorney or counselor, of any bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and purpose of bringing an action thereon.

Neither was it rendered invalid, or unlawful, by the statute making it a misdemeanor to buy, or sell, or make, or take, a promise, or covenant, to convey a pretended right or title to lands or tenements, within 3 R. S. [6th ed.], 970, § 6. But it was authorized and sanctioned, even if Chambrun acted as an attorney in making it, by section 66 of the Code of Civil Procedure. What he appears to have agreed to do, was to take measures for the recovery of this property for the appellants, for an interest of forty-seven and one-half per cent in what should, by his efforts, be realized; and while doubt was expressed in *Coughlin v. N. Y. C., etc., R. R. Co.* (71 N. Y. 443), whether the person stipulating for

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this interest could lawfully agree to make the expenditures and disbursements required for the recovery of the property by suit, it seems to have been considered in *Fowler v. Callan* (102 N. Y. 395 ; 1 N. Y. State Rep. 1), that such an agreement, when entered into in good faith, would be permitted and sanctioned, and the good faith of the parties entering into this agreement has neither been impeached nor questioned ; and the referee, therefore, rightly overruled these objections to the validity of this contract.

By the language which was employed in making it, Chambrun had the authority to enter into the agreement, which has been made the foundation of the plaintiff's right to maintain the action. For, it was agreed between these parties that, " It is besides understood that each of the parties shall be free to sell his share of the said rights at a discount agreed on between himself and the purchaser, or to preserve all his rights up to the time of the final settlement of the said inheritable rights." This clause was expressed in very broad and general language, which seemed to be intended to include all the parties who should become interested in the exertions to be made for the recovery of this estate ; and that Chambrun had the authority to make the agreement which he did with Stoutenburgh, also follows from the right secured to him, to forty-seven and one-half per cent. of the gross sums which he should recover for the Jumel heirs.

The further provision that gave him a lien and mortgage for that amount, of all the property to which he should establish their rights, in no manner reduced the force of the preceding language, which was, in effect, that he should have this sum of forty-seven and one-half per cent. of whatever might be recovered by him, under the authority of the agreement. It was not an agreement on the part of the heirs to pay him this proportionate part, but it was an agreement by which this sum of forty-seven and one-half per cent. was to be given to him, of the gross sums which should be

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recovered for these heirs. That this was the intention of the parties is further supported by the language that what each was to receive has been denominated his or their share; and the entire extent to which the heirs, under the agreement, were to become entitled to the property recovered, was the fifty-two and one-half per cent. It did not vest them with a title to the remainder of the property; and, if that was not to vest in Chambrun, the agreement contained no provision for vesting it in any one. The frame-work of the agreement, as well as these designations of the different interests, therefore, disclosed no other intention than that Chambrun was to become, under its provisions, the owner of this forty-seven and one-half per cent. And that was an interest which, in the law, as well as by the agreement itself, was capable of being assigned and charged in favor of persons employed by him for the successful prosecution of the proceedings required to be taken. It was no objection to the agreement in this manner made by Chambrun that the property had not, at the time, been recovered, or the title of the heirs to it in any manner conceded. What Chambrun acquired by the agreement was the right to this interest in the property, when it should be recovered, and the law, as well as the agreement permitted him, as this interest, when it was acquired, was to become his property, to subdivide and dispose of it to other parties. *Field v. Mayor, etc.*, 2 Seld. 179.

As to such assignments, it was said in the opinion of the court, that "Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to be inclined the other way, but which, upon examination, will

be found to have been overruled, or to have turned upon the question of public policy." *Id.* 187.

This principle has the sanction of *Wylie v. Coxe* (15 How. U. S. 415), and of *Trist v. Child* (21 Wal. U. S.), 441. It was there held that "There must be an appropriation of the fund *pro tanto*, either by giving an order, or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor." *Id.* 447. And this was again sanctioned in support of a contingent compensation for professional services of a legitimate character in *Stanton v. Embrey* (93 U. S. 548), and it also received the approval of the court of appeals in this state in *Fairbanks v. Sargent* (104 N. Y. 108; 5 N. Y. State Rep. 531).

The agreement with Stoutenburgh was to pay, or cause to be paid to him, the sum of four per cent. on any and all proceeds of property, real, personal or mixed, either in cash or land, or both cash and land, to the full extent of the property recovered, and that was made a specific lien on every part of the property, and made payable as fast as proceeds, money or property should be recovered. It is quite evident, from this agreement, that it is not to be restricted to a mere personal obligation on the part of Chambrun to pay this sum of four per cent, but that it was intended to secure to the attorney the right to that proportion of the property, or proceeds, of the litigation which was to be commenced and carried on. The language of the agreement, already referred to, discloses that to have been the intention and expectation of the parties, and that entitled the plaintiff, as the assignee of Stoutenburgh, to bring this action for the satisfaction of this contract.

After suits had been brought, by virtue of this employment, adjustments took place with the defendants in the litigation, by which valuable interests in the property affected by it, in favor of these heirs were conveyed to them. The

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first of these adjustments and conveyances took place on the 20th of June, 1880, the second in July, 1881, and the third on the 4th of April, 1883. A suit in partition was commenced after the first adjustment, for the partition and sale of the property affected by the conveyances of an undivided interest in it. This property was sold in the year 1882, and, under power of attorney given for that purpose, so much of it was purchased for the benefit of the parties as was included within the conveyances made to them, and the property obtained by these adjustments, with the exception of particular portions otherwise disposed of, was formally conveyed to the defendant, John Elliott, as a trustee.

The value of the property so conveyed to him at that time amounted to the sum of \$152,225.44, and it remained in this manner vested in him at the time when this action was commenced, in 1886. And the object of this action was to secure a disposition of the property, and the payment of the shares, out of Chambrun's forty-seven and one-half per cent. in it, to which the plaintiff had so far become entitled, and the settlement of the rights and priorities of other parties having similar claims against this proportion of the property. For this purpose the other claimants were made parties to the action; and so was the defendant Campbell, who further claimed to be entitled to compensation for services performed by him, for the heirs themselves, in the course of the partition litigation and other proceedings. The property remained in this condition until the 3d of April, 1888, but before the decision of the referee, which was on the 7th of May, 1888, a judgment had been recovered in an action commenced by Jean Albert Tauziede and another, for the sale of this property, and the sale of it was finally made under that judgment, by the trustee, in April, 1888; and a proportionate share of the proceeds of the sale has, in accordance with the determination of the referee, and the judgment entered upon it, been directed to be paid over to the plaintiff in this action. And, to that extent, the

judgment appears to have been authorized by these agreements, and the proceedings which had been taken to enforce the title of the heirs.

The right of the different claimants to be brought in as parties to this action has been resisted on behalf of the heirs, and the case recently decided of *Smith v. Hilton* has been presented as supporting this objection. But that case supplies no foundation for the objection, for there the grounds of relief brought into the action on behalf of the defendants, by their answers, were not only subversive of the plaintiff's action, but were without the jurisdiction of this court, and they neither grew out of, nor were they in any manner connected with, the subject-matter upon which the action had been made to depend. While, in this case, the other parties who have been brought in as defendants in this action, represent demands upon this forty-seven and one-half per cent. of the property and proceeds acquired under Chambrun's agreement, and between some of the claimants, conflicting equities existed, requiring to be settled before a distribution of the fund could be made. And, where that is the subject affected by a litigation in a court of equity, all the parties to it are required to be brought before the court for the adjustment of their interests before a sale of the property, or distribution of its proceeds, will be directed by a judgment. As much as that is necessary for the protection of the owner of the interest to be affected, and also for the benefit and security of the persons found entitled to participate in the distribution of the proceeds.

This is a familiar principle, often enforced and applied in courts of equity, and within its ordinary and acknowledged bounds, this case appears to be included. It was an essential step for its complete determination, that these different claimants should be brought into the litigation, and their rights litigated and determined by the judgment finally to be recovered, and that has been done, and regularly done by the proceedings which have resulted in this judgment. •

A prior right in this forty-seven and one-half per cent. to that represented by the plaintiff, had been created in favor of Stanislaus Le Vourgeois. By the agreement between Chambrun and himself, which was made in July, 1876, Chambrun transferred, out of his forty-seven and one-half per cent., seven and one-half per cent. to him, in consideration of services rendered, in discovering and ascertaining these heirs, and in settling with them, in advance, and in the absence of Chambrun, the basis of the contract of April, 1876. This was a direct transfer to Le Vourgeois of the seven and one-half per cent. mentioned in the agreement; and it was entitled to be protected as it was by the judgment, under the authorities which have already been mentioned.

On the 4th of October, 1876, Chambrun made another agreement with Levi A. Chatfield, for whose services performed and to be performed, and for information communicated, in reference to the interests of the legal heirs of Jumel, relating to this estate, Chambrun agreed to pay to him, the sum of \$1,000 in cash, within ten days after the date of the agreement; and he further agreed to pay to Chatfield the sum of \$45,000 when the title of the heirs of Jumel should be established to the property, of which he died seized in the city of New York, either by suit or compromise, and, in case less than the whole amount of property should be recovered, or the rights of the heirs thereto should be compromised for less than the whole amount, then to pay to Chatfield a *pro rata* amount of this sum, and for his security, Chambrun mortgaged and pledged his share and interest in the estate, secured to him by the contract of April, 1876.

It was further agreed, that if no part of the estate should be recovered by suit or compromise, then no part of the \$45,000 should be paid to Chatfield. As the adjustment was finally made, through the intervention of the settlement, Chatfield's proportionate part of the proceeds realized from the final sale of the property was the sum of \$11,051.80,

and that was allowed to Douglas Campbell, as his assignee, by the referee. It was no objection to this allowance that Chatfield was secured in his right to payment by a mortgage upon the interest of Chambrun; for a mortgage of a claim of this description was, of itself, a transfer so far of the title to the property, subject only to be defeated by the payment of the debt itself (*Parshall v. Eggert*, 54 N. Y. 18, 23), and for its preservation and protection, it was not required that the agreement should be filed, for the statute requiring the filing of a chattel mortgage, to preserve its validity, includes only such instruments as shall be given upon goods and chattels (3 R. S. [6th ed.], 143, § 9), and the interest in this manor mortgage was not property of that description.

The referee allowed interest on this sum, in favor of Chatfield's assignee, from the 4th of April, 1883, which was the date of the last adjustment or acquisition of property, in favor of these heirs. From that time, this proportionate part of the debt became payable, and the assignee of the creditor was, on account of that circumstance, entitled to this allowance of interest upon it.

A similar claim was allowed in favor of G. J. Schermerhorn, under an agreement made by Chambrun with him on the 25th of October, 1876. By this agreement Chambrun agreed to pay him the sum of \$10,000 when the title of the heirs should be established to the property, or any part thereof, either by suit or compromise, and by the first compromise, the title to a part of the property was conceded and established by the conveyance of the 28th of August, 1880. At that time this indebtedness became due and payable by the terms of the agreement, which was valid within the rules mentioned in the authorities last referred to. And, for that reason, this creditor was entitled to interest on this sum of money from the time of its allowance, on the 28th of June, 1880.

The referee also allowed, and that has been sanctioned by

the judgment to Harriet E. Griswold, as the assignee of her husband, William N. Griswold, two and one-half per cent. of the net proceeds of the whole property. This, of course, is payable out of Chambrun's forty-seven and one-half per cent., and, a distinct assignment, to the extent of five per cent., was made by him to Griswold, and afterwards transferred to the person in whose favor it was allowed. In making the allowance the referee has not transcended the extent of the obligation or assignment made by Chambrun. It was restricted to two and one-half per cent. of the net proceeds of the whole property, being the equivalent, certainly, of no more than was transferred by the assignment to Griswold.

The one and one-third per cent. assigned to Jesse C. Connor, by Chambrun, was reduced, by agreement, to \$2,000, and, as to that, there seems to be room for not even the slightest objection.

Neither can there be to the ten per cent. allowed to Margaret J. Smith, as executrix of her husband's estate, forasmuch as that was absolutely assigned to him by the agreement of the 25th of January, 1877, she had become obligated to give to the defendant, Campbell, a contingent advantage, after the payment to her of the sum of \$25,000, with interest from the 6th of May, 1882, out of this amount, and that was fully provided for by the referee, and the judgment entered by the direction of the court upon his report.

A further allowance was made to George J. Schermerhorn of \$30,000, with interest from the 28th of August, 1880. This has been specially resisted, not only by the heirs, but in favor of Frances A. Gesner, an immediately succeeding creditor. This resistance has proceeded upon the form of the agreement made between Chambrun and Schermerhorn for the payment of this sum of money. That agreement is in these words :

"It is hereby stipulated and agreed by and between Charles Adolphe de Chambrun, as attorney in fact of the heirs at law and next of kin of Stephen Jumel, deceased, late of the city of New York, and George J. Schermerhorn, attorney-at-law, of the city of New York, that in consideration of the services rendered by said Schermerhorn, at the request of said Chambrun, and in behalf of said heirs at law and next of kin of said Stephen Jumel, in litigations involving the title to premises in the city of New York, at one time owned by said Stephen Jumel, said Chambrun agrees to pay said Schermerhorn the sum of thirty thousand (\$30,000) dollars, and such sum of \$30,000 is hereby made a lien upon any moneys or property which said Chambrun may receive for said heirs at law and next of kin as aforesaid. It is further agreed that this agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

"In witness whereof, the above-named parties have hereunto set their names and seals, at the city of New York, this 28th day of August, 1880.

"CHARLES ADOLPHE DE CHAMBRUN [L. s.]

"GEORGE J. SCHERMERHORN. [L. s.]

"In the presence of W. R. Beach."

It has been urged, for the purpose of securing the exclusion of this allowance, that the agreement made was between Schermerhorn and the heirs of this estate, and the language which has been employed in making the agreement lends at least colorable support to this position. But it is to be remembered that Chambrun, by the agreement of the heirs with him, had no power or authority to charge the fifty-two and one-half per cent of the heirs of the estate, with this obligation. As to their interest, he had no power whatever to dispose of it or hypothecate it in any manner, and that authority having been carefully excluded by the agreement with him, it is not to be supposed that he in-

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tended by this agreement to charge or affect that interest. It was not carefully drawn, but it is to be construed, in view of the circumstances existing at the time when it was made.

Schermerhorn was employed by Chambrun to render his services as an attorney in the litigation brought for the recovery of the property; and he did devote his services to that end, and this money was payable to him for such services performed by him.

And in the execution of the agreement it was not executed by Chambrun in the name of the heirs, but solely for himself. It was his agreement, and it was so stated in its concluding clause, by which it was made to bind the heirs, executors, administrators, successors and assigns of the respective parties. Neither of the heirs was a party to this agreement, but it was wholly between Chambrun and Schermerhorn; and the reference contained in it to the services of the latter having been performed at the request of Chambrun, in behalf of the heirs at law, it is no more than was justified by the agreement between them and Chambrun, for the services of persons employed in the litigation were to be rendered for them at the request and through the employment of Chambrun. And those were the services intended to be compensated for by this agreement, and Chambrun himself agreed to pay Schermerhorn this sum of money for them, and made it a lien upon any money or property which he might receive for these heirs and next of kin.

It was, as the circumstances required it to be construed, an agreement by Chambrun to pay the sum out of the proportionate part which he might receive as the successful result of the litigation, and that bound his interest, but not the interest of these heirs and next of kin, and rendered that interest so far liable to the payment of this sum of money. But the referee added interest to the \$30,000 from the 28th day of August, 1880, which was the day of the

date, and the making of the agreement. This addition appears to be unjustified by the language of the agreement itself.

For, the \$30,000, so far as it was made to affect the property, was made payable only out of the moneys or property which Chambrun should receive. Until he received money or property, out of which this sum could be paid, or realized, the demand itself did not mature against it into an exactable indebtedness; and nothing was received by Chambrun out of which the \$30,000 could be paid, certainly before the sale made in April, 1888. For the conveyances made upon the adjustments with the persons who were defendants in the litigation instituted by the heirs, were directly made to them, and that made by the referee in January, 1884, pursuant to the sale in partition was made to Elliott, the trustee, and vested the title to the property in him to the time when the sale was made, on the 3d of April, 1888. There were exceptional sums of money received by Chambrun from the disposition of small parcels of the estate, but as to the larger, or \$15,000, it was divided between himself and the heirs, and in the proportions stipulated for by their agreement; and the residue of another sum received by him has been directed to be appropriated to the payment of costs. And these, if they had been unappropriated, would have applied to demands than this \$30,000. There was, accordingly, no money, or property, received or realized by Chambrun for the payment of this sum of \$30,000, or which he could receive, or realize before the 3d of April, 1888, and for that reason, the allowance of interest upon this sum of \$30,000 should be restricted to that time, and, in that respect, the judgment accordingly modified.

The amount of \$10,525.18, with interest, allowed to Frances A. Gesner, was supported by the assignments made by Chambrun. He expressly assigned to her all his right, title and interest in, and to all the fees, and to such money,

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or moneys, as should become due to him for services or compensation in the action in the circuit court of the United States, and also all his right, title and interest to all moneys due to him for services or compensation under any settlement made with any or all of the defendants in the action; and the second assignment, afterwards made by him to her, upon the removal of the note, was equally as effectual.

The residue of the money, consisting of the sum of \$25,000, directed to be paid to the defendant, Douglas Campbell, was authorized by the agreement entered into between himself and the widow of E. Delafield Smith. The right to this money was acquired through agreements made by Chambrun, but it is not anticipated by the parties that any substantial sum will be realized upon it after paying the preceding sums of money chargeable to this forty-seven and one-half per cent. Accordingly, no special attention is required to be devoted to this final item, the payment, however, of which seems to have been correctly allowed by the referee upon the trial.

It has been objected also that the referee erroneously allowed these claims, for the reason that the right or title of the Jumel heirs to this estate was at no time established in the litigation brought for the recovery of the property. But, while the language of the contract refers to that as the event upon which Chambrun should become entitled to the forty-seven and one-half per cent., it is clear, from the power of attorney simultaneously given, that so strict a construction of the language employed would not be justified. For, by this power of attorney, he was fully authorized in the proceedings which might be taken by him for the recovery of the property, to negotiate, compromise and give effect to, and carry out all compromises he might make, and to enter into any amicable arrangements.

These instruments were executed at the same time between the same parties, and they are required to be considered and construed together to ascertain and determine the signifi-

cance of the language employed in making the agreement itself. Even if that which they have used, standing by itself, should be held to be expressive of the fact that a technical recovery should be secured to entitle Chambrun to this proportionate part of the estate, it is not to be literally followed, as long as it appears by the power of attorney itself that the parties intended Chambrun to be vested with the power to compromise the litigation, and obtain for himself and the heirs whatever might be secured in that manner.

In providing for the fund out of which these several sums of money should be paid, the referee held and determined that the creditors having these several rights in it, were entitled to resort for their satisfaction to forty-seven and one-half per cent. of the amount finally realized in April, 1888, upon the sale of the property. He was asked to determine that the utmost extent of the right of Chambrun in the property was forty-seven and one-half per cent. of the value of it at the time when it was conveyed by the referee, after the sale made in partition. Its value was then the sum of \$152,525.43, while, at the time of the sale in 1888, the proceeds realized from the property exceeds the sum of \$340,000. The referee held the creditors, as well as Chambrun, to be entitled to forty-seven and one-half per cent. of this latter sum, giving them the benefit of the proportionate appreciation in the property, while it was held by Elliott as trustee, under the powers of attorney given to him, and the conveyances made by the referee who sold the property under the judgment in the partition suit. If the property had been divided, setting off to Chambrun forty-seven and one-half per cent., and to the heirs fifty-two and one-half per cent., at the time when it was conveyed by the referee to the trustee, then both Chambrun, and the persons claiming under him, would clearly have been limited to forty-seven and one-half per cent. of its value at that time. But no such conveyance was made; neither was the property separated or divided in any manner, but it was retained and held by the trustee

precisely as it was conveyed to him, until the sale made on the 3d of April, 1888. While it was so held, the share or interest of Chambrun was equally vested in the trustee with that of the heirs themselves. And a proportionate part of this increase in value was the increase of the forty-seven and one-half per cent. If that proportion had been conveyed to Chambrun, by the referee in the partition, and it had been held by him until 1888, this proportionate part of the increase would clearly have become his property, out of which his creditors would be entitled to the proportionate amounts assigned or transferred to them by him.

And it surely was no less so, because of the simple fact that the property remained undivided and wholly vested in Elliott, the trustee, for he held it in trust, in the proportions in which it was to be divided and distributed between these parties. For the heirs, he held the proportion of fifty-two and one-half per cent. For Chambrun and the claimants under him, forty-seven and one-half per cent. And the appreciations in these several proportions of the estate were the result of the holding of these respective proportionate titles. So far as the increase or enhancement in value was secured, it resulted to the extent of forty-seven and one-half per cent from the title and interest of Chambrun in it, and to that he, and the persons claiming under him, were clearly entitled to the benefit. To limit him and those whose titles were subordinate to his, to the value of the property at the time when it was conveyed by the referee, would be to give the increase resulting from this forty-seven and one-half per cent. to the heirs themselves, which would be more than they were entitled to under the agreement they made with Chambrun. What that entitled them to was fifty-two and one-half per cent. over expenses, and the enhancement in the value of that fifty-two and one-half per cent. representing their interest in the estate, arose out of and followed that proportionate ownership. But it did not draw to itself, or in any manner entitle them to the

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proportionate increase of the forty-seven and one-half per cent. belonging to Chambrun and the persons claiming under him, by virtue of the contract originally made between himself and the heirs. In this respect, the case differs from the decision which was made in January last, in the Case of Hynes. There, the property depreciated in value, while it was retained by the party in whom the titled was vested, and the attorney was still considered to be entitled to the stipulated one-third of the amount realized of the valuation at the time when the property was recovered.

There the depreciation resulted from the delay of the persons holding the title to sell and dispose of it, and from no fault whatever of the person entitled to receive the one-third, and there was, accordingly, no reason why the amount payable to him should be reduced below the contract which had been entered into with him, simply because the property had fallen in value after the time when he became entitled to receive his stipulated compensation.

Here there was no such result. But, on the other hand, it was favorable to the parties interested in this estate; and the enhancement in value of the forty-seven and one-half per cent. of it, was as much the property of Chambrun, as the forty-seven and one-half per cent. itself of the property conveyed by the referee to Elliott, because the advancement in the value of the property, so far as it was allowed by the referee, was the profit or advancement on this forty-seven and one-half per cent. to which Chambrun himself had become entitled.

Upon this part of the case the referee determined no more in favor of these parties than they were entitled to secure by the agreement, and the effect of the subsequent transactions. There was allowed to the defendant, Douglas Campbell, \$7,875, by way of compensation for services performed by him for the heirs themselves in the partition suit and other proceedings.

He was employed to render these services under the

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written authority of the heirs. The services were no part of those which Chambrun was required to provide for, by the agreements between himself and the heirs. They related to the property after it had been secured and conveyed to the heirs, and were necessary for the protection and maintenance of their rights. And the referee acted upon proof which must be assumed, as it has not been inserted in the case, but omitted therefrom by arrangement, and held to have been sufficient to justify this allowance.

The amount has been declared to be a lien upon the interest of the heirs in this property, and payable out of their fifty-two and one-half per cent.

This decision of the referee has been resisted as unsound by the counsel for the appellants, who has asserted the law to be that in the absence of an express agreement, it is well settled in this state that an attorney has no lien upon the cause of action of his client for his services.

Upon this subject the counsel has fallen into a significant mistake by overlooking section 66 of the Code of Civil Procedure, which has declared that, "From the commencement of an action, or the service of an answer, containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereon in whose-soever hands they may come." This enactment, so far, supplied complete authority for this part of the determination of the referee, and of the judgment which follows his report.

No other objections have been made by these heirs which require any separate or special consideration, than those to which attention has already been devoted, and it follows, from what has been said, and the authorities to which reference has been made, that the judgment, with the exception of the interest allowed to Schermerhorn under his contract of August 28th, 1880, is substantially warranted

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by the facts which have been proved and found in the case.

As to the interest allowed to him on the \$30,000, as no agreement for its payment was made, no authority for it appears to have existed. To that extent the judgment should be modified, allowing to Schermerhorn, under this agreement, out of the proceeds of Chambrun arising upon the sale of the property, this sum of \$30,000, with interest only from the 3d of April, 1888, which was the earliest day that these proceeds were payable to Chambrun, or applicable to this demand. And, so modified, the judgment should be affirmed, without cost of the appeal to either of the parties.

VAN BRUNT, Ch. J., and BRADY, J., concur.

STEPHEN M. CHESTER, Respondent, v. FRANCOIS HENRY
JUMEL *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Judgment. Relief.*—The relief awarded, if within the issue joined in an action, may exceed the demand for judgment in the complaint.
2. *Same. Vacating.*—There is no error in denying a motion to vacate the judgment, where papers which do not prejudice are improperly inserted in the judgment roll.

Appeal from an order denying a motion to vacate the judgment.

Everett P. Wheeler, for appellants.

Douglas Campbell, for respondent.

DANIELS, J.—The motion to vacate the judgment was made in part upon the ground of irregularity, founded upon the fact that it had been entered without application to the court. This was afterwards corrected and the judgment entered and settled as it is now contained in the case.

The application was also considered to be supported by the position that it could not be entered for the distribution of the funds in the hands of Elliott, or for any deficiency that might remain due to the persons affected by it, but a complete determination of the action, heard and determined by the referee, required these directions to be contained in the judgment.

It was not important that the demand for judgment contained in the complaint did not specifically require all the relief provided for by the referee and the judgment following his report. For, where an issue of fact may be taken in an action, as was the case here, the judgment is required to dispose of the action and to award any suitable relief adapted to the case and within the issue. The relief which was provided for was within the application of this provision of the Code, as it is contained in section 1207.

The judgment was also objected to as containing papers which should not have been inserted in it.

Whether the objection is well founded, depends upon section 1237 of the Code of Civil Procedure, under whose language it may well be doubted whether any more was added to, or made a part of the judgment roll, than was in this manner directed to be contained in it. But, even if papers were added which should not have been included in the judgment, no harm was produced by this addition, to the defendants, or either of them, and consequently there was no material error included in the denial of the defendants' motion. It stood upon no substantial ground. The commencement of the other action by one of the heirs while this suit was pending, and the entry of judgment in it, in no manner interfered with the jurisdiction of the court over this action, or with the progress of its proceedings. Whatever irregularity there was, consisted in the commencement of the other suit by one of the defendants in this action while this suit was pending and in progress, and if this had been interposed as a defense in the other action, there seems

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to be no legal answer which would have prevented it from proving successful.

The order was right, and it should be affirmed, with ten dollars costs and the disbursements.

VAN BRUNT, Ch. J.. concurs.

STEPHEN M. CHESTER, Respondent, v. FRANCOIS HENRY JUMEL *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Costs. Additional allowance.*—Additional allowances of costs, where the litigation principally arose out of the contest of the defendants *inter sese*, are properly charged against moneys belonging to them.
2. *Same.*—Where the suit is brought for the benefit of all the parties to it, in order to secure a settlement of their rights before a distribution of the fund or property should be made, an allowance of costs to plaintiff, in a difficult and extraordinary action, is proper.

Appeal from an order of the special term granting an additional allowance of costs.

Everett P. Wheeler, for appellants.

Douglas Campbell, for respondent.

DANIELS, J.—By the order from which the appeal has been taken, the sum of \$500, in addition to the costs, was allowed to the plaintiff in the action, and, as the suit was brought for the benefit of all the parties to it, in order to secure a settlement of their rights before a distribution of the fund, or property, should be made, this allowance seems, under the circumstances, to have been proper. That the action was difficult and extraordinary is substantially free from doubt. Upon each side of the case that was clearly its character, and the allowance to the plaintiff does not appear to have been, in any manner, excessive.

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A further allowance of \$1,000 was made to the defendant Campbell. The sum of \$500 was allowed to the defendant Smith; and a like amount to the defendant Schermerhorn. His claim, as it was directed to be paid, should be reduced by the deduction of interest allowed from August 28, 1880, to April 3, 1888, and a corresponding reduction should, consequently, be made in this allowance of costs.

As to the others no reason appears for interfering with them. They have been made payable out of a fund realized by the defendant Chambrun, and the Jumel heirs. No other person, therefore, had any reason to, or has complained of these allowances, and, as the litigation, protracted as it was, principally arose out of the contest of these defendants, the allowances were properly charged against moneys belonging to them.

The order directing their payment, with the single exception which has been stated, seems to have been right, and, with the modification reducing the allowance to Schermerhorn in the proportion in which the moneys awarded to him have been reduced, should be affirmed without costs to either party.

VAN BRUNT, Ch. J., concurs.

STEPHEN M. CHESTER, Respondent, v. FRANCOIS HENRY JUMEL *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Witnesses. Credibility.*—A referee may believe the portion of the testimony of a witness which he deems to be worthy of confidence, and reject the residue.
2. *Same.*—He may discredit the testimony of parties and interested witnesses.

Appeal from a judgment entered upon the report of a referee.

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Everett P. Wheeler, for appellants.

Douglas Campbell, for respondent.

DANIELS, J.—By the judgment which has been recovered, there was allowed to the appellant his commissions as trustee upon the proceeds of the property recovered in the action. There was also allowed to him the sum of \$5,000, to be paid to his attorney for services performed by him. It was claimed upon the trial, however, that the appellant Elliott should receive the sum of twelve per cent. upon the moneys realized by virtue of an agreement made between himself and the defendant Chambrun. The referee rejected this claim, apparently because of the unsatisfactory nature of the evidence given to sustain it. This evidence was obtained from the witnesses Elliott and Chambrun. That of the former was not consistent with the answer first interposed by him in the action. Neither was it with the statements proved to have been made by him, concerning the expected amount of his compensation; nor did it agree in the extent of the claim with the testimony of the defendant Chambrun. That given by each of these witnesses, in view of the other testimony, was not conclusively controlling upon the referee. These witnesses were interested in the maintenance of this claim, and their evidence for this reason was subject to the qualification that it could be discredited if the referee considered that to be the just view of its effect. *Gildersleeve v. Landon*, 73 N. Y. 609.

He did so regard the testimony of these witnesses, and, for that reason, disallowed the percentage claimed under the alleged agreement. And that he was justified in doing by the well-settled principle relating to the testimony of parties and interested witnesses.

And the case is not excluded from the operation and effect of that principle by reason of the circumstance that

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the referee placed some reliance in other respects upon the testimony of these two persons. That, it is evident, he did, because of some of the conclusions adopted by him. But the fact that he believed the witnesses to be truthful as to those matters, did not require him to accept their testimony as to the agreement itself, which he evidently considered not to have been proven. Upon this subject the rule permitted him to believe that part of the evidence of the witnesses which he deemed to be worthy of confidence, and to reject the residue. *Becker v. Koch*, 104 N. Y. 394; 5 N. Y. State Rep. 688; *President, etc., v. Phillips*, 109 N. Y. 383; 16 N. Y. State Rep. 199.

This part of the case depended wholly upon the credibility of these witnesses, and as that was not considered to be reliable by the referee, because of the manner of their testifying, and of their interest in the subject of this part of the litigation, the referee was justified in rejecting this further claim for commissions.

For the same reasons the referee was also supported in his conclusions not to advance the allowance made to the attorney so far as to include the additional \$3,000 claimed in his behalf. In each respect the case presented no more than a fair question of fact, and the conclusions of the referee are entitled to be supported by the court.

The judgment, so far as it is drawn in question by this appeal, should be affirmed, with costs.

VAN BRUNT, Ch. J., concurs.

STEPHEN M. CHESTER, Respondent, v. FRANCOIS HENRY
JUMEL *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

Jurisdiction.—A priority of right over the subject matter is obtained by the proceedings in an action first begun in which all persons interested were made parties, and complete jurisdiction is thereby secured; and no attempt can be made in a second suit to interfere with the litigation in the former action, or to divest the court of the power to complete its hearing, and make a final disposition of the subject matter of the litigation

Appeal from a judgment entered upon the report of a referee.

H. B. Titus, for appellants.

Douglas Campbell and *Edward Winslow Paige*, for respondent.

DANIELS, J.—The points which have been presented in support of this appeal have so far been considered and disposed of in the appeal taken by the heirs from the judgment as to render it necessary to add but little for the disposition of this appeal. Neither the contract made between the defendant and the heirs, nor the construction of it adopted by the referee, has here been drawn in question. But it has been insisted that the parties, whose rights, as assignees, have been held to be properly sustained by the referee, should not be allowed payment of their demands out of the proceeds of the property. No further consideration is necessary than that which has already been bestowed upon these points, for their final disposition.

It has, however, been insisted that the court had no jurisdiction of this action, after the suit was brought and the

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judgment recovered in that suit in favor of Jean Albert Tauziede and another, directing the sale and disposition of the property. But, that objection is clearly without any foundation whatever. For the action in this manner referred to was commenced after the actions in which the judgment appealed from was recovered, and the second action was in no manner interposed by way of defense to the first action. Neither could such a defense have succeeded if it had been presented before the referee for his decision. By the proceedings in the action, commenced by Chester, to which all the parties were made defendants, a priority of right over the subject-matter was obtained. Jurisdiction complete, in all respects, was in that manner secured. And no attempt was made nor could it have been made in the second suit, to interfere with that litigation, or to divest the referee, or the court, of the power to complete its hearing, and make a final disposition of it. On the contrary, the judgment in the second suit has proceeded upon the conclusion that the judgment in the action tried before the referee, was, in all respects, conclusive upon the rights of the parties, and it has directed a disposition of the proceeds of the property in conformity with the conclusions maintained by the judgment in this preceding suit.

By the present appeal, no substantial reason has been presented for interfering with the decision in the other action, further than that which has already been directed and provided for by the disposition of the other appeal.

The judgment on this appeal should, accordingly, be affirmed, but without costs to either party.

VAN BRUNT, Ch. J., concurs.

AMELIA M. CITROEN *et al.*, Appellants, v. THOMAS ADAM,
Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

Question of fact.—It is for the jury, and not for the court, where the undisputed evidence supports two inferences, to say which inference ought to be drawn from the facts, even though the facts are undisputed.

Appeal from a judgment entered upon the dismissal of the complaint at the close of plaintiff's case.

George Carlton Comstock, for appellants.

E. P. Wilder, for respondent.

BARTLETT, J.—The plaintiffs are importers of diamonds, carrying on business in the city of New York. On July 13, 1885, they let Mrs. Pauline Jacquin have a pair of diamond earrings to sell to a customer whom she said she had, named Mrs. Morgan, for \$1,400. Mrs. Jacquin did not bring back the money or return the earrings, and the diamonds were eventually discovered in the custody of the defendant, who is a pawnbroker, trading under the name of Thomas Green, and who claims to have advanced \$600 upon the earrings upon a pledge of the same to him by Mrs. Jacquin.

This suit was brought to recover the diamonds, or their value, which is fixed in the complaint at \$1,365, together with damages for the detention thereof, to the amount of \$135. At the close of the testimony offered in behalf of the plaintiffs, the complaint was dismissed upon motion of the defendant, and from the judgment entered upon such dismissal the plaintiffs now appeal.

The facts clearly resemble those which were presented in

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Heilbron v. McAleenan (16 N. Y. State Rep. 957), which was an action arising out of a similar transaction on the part of Mrs. Jacquin and her son. In the case at bar the complaint must have been dismissed, on the ground that Mrs. Jacquin, under the arrangement between her and the plaintiffs, acquired a general power of sale instead of having her authority restricted to the right to sell and deliver to a particular person only. If the evidence on the part of the plaintiffs warranted no other conclusion than that the power of sale conferred upon Mrs. Jacquin was general, so that she became a factor of the plaintiffs, then this disposition of the case might have been correct; but we do not think that the proof necessarily demanded that inference.

On the contrary, it seems to us that the jury might well have found, from the testimony of the plaintiff, Kauffmann, that the goods were entrusted to Mrs. Jacquin for a special purpose only, that is, to be sold to the Mrs. Morgan who was spoken of, and that there was no design or intention on the part of the plaintiffs to entrust the diamonds to Mrs. Jacquin, to sell to any other customer, or to give her any general power of sale in respect to them. It is true that the plaintiff, Kauffmann, testified, on cross-examination, that he supposed he would have taken the money if Mrs. Jacquin had sold the earrings to some other customer than Mrs. Morgan.

"One man's money," said the witness, "is as good as another's." But this statement, after the event, amounts to nothing more than saying that the plaintiffs would have been satisfied if they had been paid for their diamonds without caring, particularly, as to the source whence payment proceeded. It cannot fairly be interpreted as meaning that they bestowed upon Mrs. Jacquin, their bailee, a general, instead of a special and restricted power of sale. The most that can be said is, that the testimony in respect to the authority conferred upon Mrs. Jacquin, by the arrangement between her and the plaintiffs, was capable of supporting two

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inferences: one that the power of sale was special, the other that the power of sale was general. Under these circumstances, it was for the jury, and not for the court, to say which inference ought to be drawn from the facts, although the facts were undisputed. *First National Bank of Springfield v. Dana*, 79 N. Y. 108, 112; *Smith v. Coe*, 55 N. Y. 678. We think that a case was presented which should have been allowed to go to the jury; and even if a general power of sale was established, the defendant ought to have been put to his proof that he was a pledgee of the diamonds in good faith, and entitled to a lien upon them to the amount of the \$600 which he claims to have advanced.

The judgment should be reversed, and a new trial granted, with costs to the appellants to abide the result.

VAN BRUNT, Ch. J., and DANIELS, J., concur.

BAER ROSENBERG, Plaintiff, v. MEYER FREEMAN *et al.*,
Defendants.

Supreme Court, First Department, General Term, May 25, 1889.

Taxes and assessments.—Where an owner of a portion of the property abutting upon an alleyway pays a part of the amount of the assessment levied upon said alley, which payment is credited generally on the whole assessment without apportionment, the unpaid balance of the tax remains a lien upon the whole of the alleyway.

Agreed case upon controversy submitted without actions.

G. & H. Levy, for appellant.

M. S. Isaacs, for respondent.

VAN BRUNT, P. J.—On the 1st of July, 1887, the defendant, Meyer Freeman, was the owner in fee of certain premises in the city of New York, and on that day entered into a contract in writing for the sale of the property. Ap-

purtenant to said property was an easement in an alley, in common with the owners of other lots abutting upon the alley. Two assessments were, in 1873, levied by the municipal authorities upon the alleyway described in said contract, which assessments were claimed to be valid liens upon said alleyway. The Mechanics and Traders' Fire Insurance Company, in the year 1883, were the owners of the premises described in the contract, and in February of that year, for the purpose of discharging the lien of said assessment on the one-third part of said alleyway, adjoining said premises owned by it, paid to the comptroller of the city of New York a sum of money equal to one-third of the whole assessment on said alley, and received certain receipts therefor from the clerk of arrears. The said Mechanics and Traders' Insurance Company made an application to the comptroller for an apportionment of the assessment, apportioning the same upon the part of the alley abutting upon the lot owned by it. There was a paper made, only purporting to apportion the assessment, which, however, was never signed by the comptroller.

The money was received and subsequently credited as a payment on account of the whole of said assessment, so that the books show that the undivided two-thirds of said assessment are still liens upon the whole of said alleyway. The plaintiff objected to the title of said premises by reason of the alleged lien of the residue of said assessment, and the defendants in consideration of the plaintiff's accepting the title to, and completing the purchase of said premises with said apparent lien outstanding, made and delivered to the plaintiff their promissory note for \$130. A writing was simultaneously executed and delivered, stating that the note was received as security against an alleged claim by reason of the unpaid assessment, and in accordance with an agreement to be made between the grantor of the premises and the plaintiff as to the question raised by such assessment, the manner of such adjudication or other settlement to be

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arranged by the respective counsel. The title to the premises was accepted by the plaintiff, and the purchase thereof completed; the deed containing a general warranty and assuring to the plaintiff the fee simple to said premises and the use of said alleyway, free from incumbrances except certain mortgages. When the note became due and payable it was duly presented and payment thereof demanded, but the defendants refused to pay the same on the ground that there was a failure of consideration, the assessments being no longer liens upon said alley by reason of the payment of the one-third part thereof to the city of New York. The plaintiff demanded judgment for the recovery of \$130, the amount of said note with interest.

The question is whether a recovery may be had upon this note.

It is claimed upon the part of the defendants that because there has been a payment on account of said assessment, that therefore one-third of the premises were discharged from the payment of the assessment, and a sale of the other two-thirds cannot be had. The difficulty with this proposition is that the facts do not bear out the contention. The assessment was never actually apportioned, neither was any part of the premises relieved from the payment of the two-thirds remaining unpaid of the assessment. The money received by the comptroller was credited upon the whole assessment, leaving two-thirds of the assessment still unpaid as to the whole alleyway.

The case of *Jordan v. Hyatt* (3 Barb. 275) is therefore not in point. That case simply held that the undivided half of a lot cannot be sold to pay an assessment. In the case at bar the whole lot was subject to the lien of that portion of the assessment which remained unpaid, no part thereof being discharged.

Under these circumstances a recovery upon the note could not certainly be had because of the breach of the condition

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upon which it was given. The plaintiff should therefore have judgment for \$130 and costs.

CULLEN, J., concurs.

GEORGE F. FITZPATRICK, Respondent, v. THE NEW YORK
AND MANHATTAN BEACH R. R. Co., Appellant.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Evidence. False imprisonment.*—In an action for false imprisonment on a charge of larceny, the evidence of the physical condition of plaintiff's brother, who was arrested with him, is competent to show that the defendant's servants had no reasonable grounds to believe that he and his companion have been guilty of theft.
2. *Same.*—Evidence to show that the defendant had the control and management of the premises on which the arrest was committed, is proper.
3. *Same.*—The refusal to permit a witness to testify as to the description of the thief given by the complainant to him, where no such question was submitted to the jury, is not error.

Appeal from a judgment entered upon a verdict in favor of the plaintiff.

W. J. Kelly, for appellant.

F. R. Coudert, for respondent.

VAN BRUNT, P. J.—This action was for false arrest and imprisonment of the plaintiff by a policeman and detectives claimed to be in the employ of the defendant. Two persons were arrested at this time under precisely the same state of facts. The other person arrested, being the brother of the plaintiff, James C. Fitzpatrick, brought an action against the defendant, and recovered damages for such arrest. The grounds upon which the defendant sought to relieve itself from such recovery were the same as those which were raised upon the trial of the case at bar.

Upon appeal to the court of appeals the verdict was sustained for the reasons given in the dissenting opinion of Mr. Justice BRADY. The affirmance will be found in 101 N. Y. 617, and the decision of the case at the general term is partially reported in 15 Weekly Digest, p. 506.

It is not at all necessary to reconsider the questions which were raised in that case and determined against the defendant. The only points to be considered are the exceptions which have been raised to the admission of evidence.

The question as to the physical condition of the plaintiff's brother does not seem to have been objectionable, in that it was part of the plaintiff's case to show that the persons making the arrest had no reasonable ground to suppose that he and his companion had been guilty of the theft charged.

The testimony of Burnap was also entirely admissible, because such testimony was offered for the purpose of showing that the premises upon which a large part of this trespass was committed were under the control and management of the defendant.

The other exceptions criticising the manner of the cross-examinations were not at all well taken. In fact, the only question which seems to be specially criticised was never answered.

The refusal of the court to allow the witness Wilkinson to testify as to the description given him by the complainant, and on which the alleged arrest was claimed to be made, is not well founded, in that no question of this kind seems to have been presented to the jury. The naked question left to the jury upon the commission of the crime was, whether any complaint whatever had ever been made to these detectives, there being an irreconcilable conflict of testimony between them as to its origin.

The judgment should be affirmed, with costs.

DANIELS, J., concurs.

**BENJAMIN RICHARDSON, Appellant, v. JOHN DAVIDSON,
Respondent.**

Supreme Court, First Department, General Term, May 24, 1889.

1. *Pleadings. Defenses.*—It is the duty of a defendant in an action, whether he has a legal or equitable defense, to set up both or either of them in the first action commenced, relating to the subject-matter. He cannot reserve an equitable defense, and then file a bill to restrain another, either legal or equitable, action.
2. *Same.*—When the defendant has answered in the first action without setting up his equitable defense, it is immaterial whether or not full relief can be granted to him under such answer. It was his own fault that he did not avail himself of such opportunity, and he cannot be allowed to intervene subsequently and enjoin the trial of that action, in order that his defense may be tried in a separate suit.
3. *Same.*—It is too late for a defendant, after he has allowed a number of suits to be ready for trial, to file a bill to establish his defenses to those actions on the ground of preventing a multiplicity of actions.

Appeal from so much of an order as denies a preliminary injunction.

W. T. Washburne, for appellant.

Thos. Darlington, for respondent.

VAN BRUNT, P. J.—In May, 1887, the defendant commenced three actions against the plaintiff and others for the foreclosure of three mortgages. Issue was finally joined in said foreclosure suits on the 19th of October, 1887, by the service of a reply. The case was on the calendar in October, and, during the November term, consents were signed, and an order entered referring the case to a referee to hear and determine, notices of reference were served, and the cases set down for trial on December twelfth,

and on the eighth of December, four days before the day fixed for the trial, the summons, complaint and preliminary injunction in this action were served upon the defendant herein, the complaint and affidavit being sworn to on the first of December. By the injunction, the defendant was, amongst other things, restrained from further prosecuting or attempting to prosecute the said foreclosure actions. The injunction was accompanied by an order to show cause why it should not be made permanent. Upon the hearing of the motion to make the injunction permanent, the same, so far as it affected the prosecution of the action in question, was dissolved, and from the order thereupon entered this appeal is taken.

It is true that the learned court, in its opinion, stated as one of the reasons for the dissolution of the injunction that the plaintiff could, under his answer in the foreclosure actions, obtain full relief in those actions. But it is immaterial as far as the decision of this motion is concerned, whether he could or could not obtain all the relief which he asked in this action under his answers in the foreclosure suits. If the plaintiff herein had any defense to those suits, whether legal or equitable, he was bound to set it up in those actions, and he will not be permitted to file a bill, or maintain an action for the purpose of obtaining an injunction against the prosecution of another suit, when the other suit is open to him for the establishment of the defense which he seeks to make a cause of action. Since the abolition of the distinction between the jurisdiction of the court, in respect to legal and equitable defenses, it is the duty of a defendant in an action, whether he has a legal or equitable defense, to set up both or either of them in the first action commenced relating to the subject matter. He cannot reserve an equitable defense, and then file a bill to restrain the prosecution of another, either legal or equitable action.

As has been said in the case of *Savage v. Allen*, 54 N. Y.

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458, the proposition that a separate action may, under our present system, be maintained to restrain, by injunction, the proceedings in another suit in the same or another court, between the same parties, where the relief sought in the latter suit may be obtained by a proper defense to the former one, has long since been exploded, or, if not, should be, without delay. The whole policy of the law is, that suits shall not be maintained for the purpose of setting up defenses to alleged causes of action. Where a party has a defense, he must set it up in answer to the cause of action alleged, and where an action is brought upon a cause of action, the defendant is bound to set up his defense in that action, in order that it may be there tried, and not attempt, by a separate action, to impede the prosecution of the action first commenced. Therefore, as far as the consideration of the question of the propriety of the maintenance of this injunction, in respect to the foreclosure actions, is concerned, it is immaterial whether full relief could be granted to the plaintiff under his answer or not. He might have set up as a defense to those actions, that which he now seeks to avail himself of, and, if he did not set it up, he cannot be allowed now to intervene and prevent the trial of those actions in order that his defense thereto may be tried in a separate suit.

The claim that the plaintiff will be compelled to try his defense in four separate actions, is not ingenuously taken. It appears that each and all of the foreclosure suits have been referred to a single referee, and that it was undoubtedly the intention of the parties that they should be tried as one suit, and that there should not be separate trials in each. But even if the contrary were the case, after a party has allowed suits to go to issue, and to be ready for trial, it is too late for him to claim that the court shall take cognizance of a bill filed to establish his defences to those actions upon the ground of preventing multiplicity of suits. If he was so anxious to avoid it he had an opportunity to bring

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his action at once, when he was apprised of the claims made by the defendant in this action, and plaintiff in the foreclosure actions, and he cannot rest and wait until the other cases are placed on trial, and then file his bill to prevent multiplicity of suits.

It is not necessary to consider this question upon the merits as to whether a cause of action is made out by the complaint, or whether it is not.

It is clear that the plaintiff has been guilty of laches if he has any cause of action which might be established as a defense to the bonds and mortgages in question, and it is also equally clear that he was bound to set up this defense in this action, or he is forever barred from asserting it.

We think, therefore, that the plaintiff has made no cause whatever for the maintenance of this injunction, and that the order vacating the same was correct, and should be affirmed, with ten dollars costs and disbursements

MACOMBER and BARTLETT, JJ., concur.

MARGARET FOSTER, Respondent, v. THEODORE M. ROCHE,
Trustee, etc., Impleaded, *et al.*, Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Partition*.—A depositary of funds is justified in paying them in accordance with the original judgment in the action, where neither it, nor its officers, have been served with an order amending the interlocutory judgment in regard to the disposition of such funds.
2. *Same*.—When the purchaser completes his bid by paying to the referee the amount thereof, he discharges his whole duty in the matter.
3. *Same*.—The party who consents, before an amendment to the judgment in regard to the disposition of the fund is known to the depositary, that the moneys may be drawn out under the original judgment, can not be heard to complain.

Appeal from an order of a special term denying a motion to vacate the record of a deed executed by the referee, in an

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action of partition, and to compel the purchaser to surrender and deliver up such deed.

George W. Gibbons (*J. C. Bolton*, of counsel), for appellants.

Goodrich, Deady & Goodrich (*John A. Deady* of counsel), for purchaser.

P. & D. Mitchell, for respondent.

MACOMBER, J.—An interlocutory judgment was entered in this action, in the month of June, 1886, directing that the premises be sold by James Kearney, as referee, and that the proceeds of such sale, after paying incumbrances and expenses of the sale, be paid to the plaintiff, and to the defendant Roche, as trustee. Subsequently, and on the 29th day of September, 1886, on the application of the defendant Roche, the court ordered that the purchaser or purchasers at the sale of the premises pay the amount of the purchase-money into the Farmers' Loan and Trust Company to the credit of this action to be drawn after two days' notice of an application therefor to be given by the referee to the respective attorneys or by either of the parties to the other. Six days thereafter the premises were sold and a portion thereof, namely, that known as No. 47 Great Jones street, was bought by Charles B. Fitzpatrick. The residue of the premises was purchased by the plaintiff. In the month of March, 1887, the parties stipulated in writing that the order made on the twenty-ninth day of September preceding, requiring the moneys to be deposited in The Farmers' Loan and Trust Company to the credit of this action to be drawn out only on notice, be cancelled and set aside.

It appears by the findings of the referee, to whom the matter was referred, that the depository and its officers never have been served with a copy of the order requiring the moneys to be deposited and drawn out as above, and were ignorant of the same.

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It appears, from the facts established in the case, that the purchaser discharged the whole of his duties when he completed his bid by paying the money into the hands of the Trust Company.

In the absence of a service of a copy of the amended judgment upon the trust company, and in the absence of the knowledge of its officers, of the existence of such modified judgment, the moneys were withdrawn by the referee regularly, so far as either the company or the purchaser was aware. The appellant having consented in writing, at a time before the existence of the amendment to the judgment was known, that the moneys might be drawn under the judgment as it originally stood, cannot now properly be heard to complain if any loss ensued.

The order appealed from should be affirmed, with costs and disbursements.

VAN BRUNT, Ch. J., and BARTLETT, J., concur.

SOPHIE LUHRS v. ANNA LUHRS.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Benefit societies. Substitution.*—In order to entitle a substituted beneficiary to the benefit, there must be a complete substitution of beneficiaries in the form prescribed by the constitution and by-laws of the association; and, if anything remains to be done in order to complete the transaction according to such constitution and by-laws at the time of the death of the insured, there has been no substitution, and the original certificate still remains in force.
2. *Same.*—The new certificate must be completely issued by the association, and accepted by the assured, before his death.

Motion for a new trial upon exceptions, and motion for a judgment by the defendant upon a verdict directed by the court at circuit.

4. *Steckler*, for plaintiff.

Cameron & Kropp, for defendant.

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VAN BRUNT, P. J.—There is no contradiction as to the facts developed upon the trial, and they seem to have been as follows :

That the plaintiff was the widow of one John Luhrs, and the defendant was his sister ; that the Supreme Lodge, Knights of Honor, was a benefit and charitable organization, organized under the laws of New York, doing business in such state and having property within the state ; that in or about the year 1881, Luhrs became a member of said corporation, and of the Allemania Lodge, located in the city of Brooklyn, which lodge was a branch of said corporation ; that pursuant to its regulations said corporation issued to said Luhrs a certificate that if he should be in good standing at the time of his death, upon the happening of that event, said corporation would pay out of the widows' and orphans' fund to his widow, Sophie Luhrs, the sum of \$2,000, upon satisfactory evidence of his death, and the surrender of the certificate, provided that said certificate should not have been surrendered by said member as cancelled, at his request, and another certificate issued in accordance with the laws of the order ; which certificate John Luhrs accepted in writing, upon the conditions therein named.

By the constitution and by-laws of the corporation, the objects of the order were defined to be to promote benevolence and charity by establishing widows' and orphans' benefit funds, from which, on satisfactory evidence of the death of a member who has complied with all its lawful requirements, a sum not exceeding \$2,000 shall be paid to such member or members of his family, or person or persons dependent upon him, as he might direct or designate by name to be paid as provided by general law. The provision in regard to the form of benefit certificates provided that every lodge should forward to the supreme reporter all applications for membership, and that each application should have the name or names of the person or persons to

whom the benefit is to be paid inserted therein, and where more than one certificate has been issued to a member, the beneficiary named in the last certificate shall alone be entitled to the benefit.

The constitution and by-laws contained also the following provisions : That a party desiring to change his beneficiary might at any time, while in good standing, surrender his certificate to his lodge, which, together with a fee of fifty cents, should be forwarded by the reporter of his lodge, under seal, to the supreme reporter, who should thereupon cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed, within the limitations prescribed by the laws of the order, said surrender and direction to be made on the back of the benefit certificate surrendered, signed by the member and attested by the reporter, under seal of the lodge. On the 8th of March, 1887, the said Luhrs signed upon the back of the original certificate issued to him a surrender of the same and a direction that a new one be issued to him, payable to his sister, Anna Luhrs, the defendant.

This paper a man by the name of Meyer took and put in an envelope (whether by the direction of Luhrs, or not, does not appear), and sent it to the reporter of the Allemania lodge by mail, who received it on the ninth of March, and on the tenth of March, having attested the same, and attached the seal of his lodge thereto, he mailed the certificate to the Supreme Lodge. On the tenth of March, John Luhrs died, and on the twelfth of March, a new certificate was issued payable to Anna Luhrs, which certificate required the signature of the member accepting it upon the conditions therein named.

The plaintiff having brought an action against the Supreme Lodge, Knights of Honor, upon the original certificate, and Anna Luhrs, the defendant, having made a claim upon the substituted certificate, said Anna Luhrs was interpleaded, and she became defendant.

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Upon the trial the learned court below directed a verdict for the defendant upon the substituted certificate.

The only question which it is necessary to consider upon this appeal, is whether there had been a substitution of beneficiaries under the rules and regulations of the corporation under which the insured had become a member. We think there had not, because the attempt at substitution had not been completed. It is necessary, in order that the new beneficiary should obtain rights under the attempted substitution, that such change must be made in the form subscribed by the constitution and by-laws of the association, and if anything remained to be done in order to complete the transaction according to such constitution and by-laws at the time of the death of the insured, then there has been no substitution, and the original certificate still remains in force.

It is to be observed that under the rules and regulations of the corporation, the insured has not a right to name any person whom he may please as his beneficiary. Such beneficiary must be some member of his family or person dependent upon him, and his benefaction is limited to some person or persons embraced within these two classes.

And it is further provided that the subordinate lodge must forward to the supreme reporter all applications for membership, and that each application shall contain the name or names of the person or persons to whom the benefit is to be paid inserted therein, and it follows that it is then for the supreme reporter, or the authorities of the supreme lodge, to determine as to whether the persons named as beneficiaries come within the limitations prescribed by their rules, so that a certificate could be issued. Then there is a provision that where more than one certificate is issued, the beneficiary named in the last certificate shall alone be entitled to the benefit. In other words, where there has been a complete substitution of beneficiaries, there the last beneficiary so substituted shall be entitled to the benefit.

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The provision for this substitution is explicit. The right may be exercised at any time, but it is to be done in the manner prescribed by the rules, which is that a party desiring to change his beneficiary may, at any time, while in good standing, surrender his certificate to his lodge, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge, under seal, to the supreme reporter, who shall, thereupon, cancel the old certificate and issue a new one, in lieu thereof, to such member, payable as he shall have directed, within the limitations prescribed by the laws of the order.

It is necessary, therefore, that the supreme reporter should cancel the original certificate after it is received by him, and we can see no reason why, until that cancellation has taken place, there could not be a recall of such surrender by the member. Therefore, the cancellation in question was not a completed act at the time the insured died. The original certificate had not then been cancelled by the supreme reporter, and, in fact, had not been received by him, and the substitution was only in process of accomplishment. There is another provision which re-enforces this view, and that is, that after the supreme reporter shall have cancelled the old certificate he shall issue a new one, in lieu thereof, to such member, payable as he shall have directed, within the limitations prescribed by the laws of the order. So that after the receipt of the certificate, and the surrender and the direction, the supreme reporter has no power to act, unless the direction is within the limitations prescribed in the laws of the order.

And it is necessary, in order that the substitution shall be complete, and that the new certificate be issued to the member, that the supreme reporter should determine that fact. It cannot be issued to any one else; it must be issued to such member, and it is because of the issuance of this certificate that the right in the beneficiary arises. There is no contractual relation upon the part of the corpo-

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ration to the beneficiary, until the certificate is issued to the member insured. And upon the face of the certificate it appears that it was one of the requirements of the corporation, in its method of doing business, that the party should accept the certificate upon the conditions therein named. The member could not accept after he was dead; neither could the corporation issue the certificate to him after he was dead; they could make no contract with him, nor could any rights be conferred by any paper issued by this corporation after the death of the member, and all power to act had thus been ended.

The foundation of the claim against the corporation, resting upon the issuance of this certificate, or policy, if it may be so called, and no policy having been issued to the member, or accepted by him, it is difficult to see how any rights were conferred upon the beneficiary named in this incomplete contract.

It is urged that the death of John Luhrs could not abrogate the power of appointment, by him previously executed in due form.

That may be true. But, in order that the power of appointment should be complete—in order that the substituted beneficiaries should have any claim against the corporation, it was necessary that the new certificate should be issued, such certificate being the only evidence of title which the beneficiary could possibly possess, and if before this new contract could be issued to the insured he died, the corporation had no power to issue any certificate, and, consequently, the attempted surrender was incomplete, and no rights were conferred thereby.

We think, therefore, that the exceptions should be sustained and a new trial ordered, with costs to the appellant to abide the event.

MACOMBER and BARTLETT, JJ., concur.

JOHN H. MASTERTON, Appellant, v. JAMES BOYCE, Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Appeal. Findings of fact.*—In determining whether the findings of facts of a referee are against the weight of evidence, it is necessary for the general term to examine all the evidence in the case, in order to see whether such a preponderance exists in favor of the appellant, as will call upon the court to reverse the conclusions of the referee, who had the witnesses before him and can best judge as to the amount of credence to be given to each witness.
2. *Same.*—A finding of a referee cannot be set aside upon the ground of probabilities; the evidence must disclose a reasonable certainty of error in the court below, before a result upon a question of fact can be disturbed. It is not sufficient to justify such action that, if the case had been originally submitted to the appellate court for decision upon the record, it would have come to a different conclusion.
3. *Evidence. Parol.*—An agreement entered into, in good faith, for the purpose of defining and fixing the relations between the parties, where it does define and fix them, expresses the true relations of the parties, and the previous negotiations and relations of the parties are immaterial.
4. *Same.*—Loose expressions in letters cannot change the exact and clear language of agreements.
5. *Witnesses. Attorney.*—Where the privilege has been waived, the testimony of counsel in the action, is competent.
6. *Same. Previous statements.*—The declarations of a witness, made before or after trial, is competent to impeach his testimony.

Appeal from a judgment entered upon the report of a referee, dismissing the complaint.

Michael H. Cordozo, for appellant.

William G. Wilson, for respondent.

VAN BRUNT, P. J.—This action was brought to recover

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damages sustained by the breach of an alleged warranty of the defendant, made upon the sale of certain shares of stock of the Maryland Union Coal Company to the plaintiff. The answer of the defendant was substantially a general denial.

The plaintiff claimed to maintain his cause of action by proof tending to show that he bought the stock in question from one White, who made certain representations and warranties in respect to the property owned by the company, which representations were false, and which warranties were broken, and that said White, in making these sales of stock and in making these representations and warranties, although ostensibly acting for himself, was, in reality, the agent of the defendant, and authorized to make the representation and warranties upon the sale of this stock, which he did.

The defendant gave proof tending to show that White was in no respect his agent, and had no authority to make any representations or warranties on his behalf.

The referee who tried this case, upon this conflict of testimony, found that White was not the agent of the defendant in the sale of this stock, but that the relation between the defendant and White was that of vendor and vendee, and, therefore, the defendant was not liable to the plaintiff for any misrepresentations made by White upon the sale of the stock, nor for the breach of any warranty given by White at the time of such sale. Notwithstanding the magnitude of the amount involved in these litigations (there being three other actions of a similar nature tried at the same time), the referee did not think it worth his while to write any opinions by which we can judge as to what weight he thought proper to give to the different portions of the conflicting evidence offered in the trial, or as to what impression the demeanor of the different witnesses who were examined before him made upon his mind; and we are left to consider the main question presented upon this

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appeal, without that assistance which is so important in order that the appellate court may be, in some respects, placed in the same position as that occupied by the court below, in determining whether the facts found are totally unsustained by evidence, or whether they are against the weight of evidence.

The main question presented upon this appeal is whether the findings of fact of the referee are against the weight of evidence. In the determination of this question it has been necessary to examine all the evidence in the case in order that we might see whether there was such a preponderance of evidence in favor of the plaintiff as would call upon this court to reverse the conclusion of the referee who had had the witnesses before him, and who could best judge as to the amount of credence to be given to each.

It is not considered necessary in stating the conclusion at which we have arrived to review at length the testimony produced upon the trial, but a general statement of the considerations which have induced this result seems to us to be sufficient.

It seems to be established in this case that the plaintiff was induced to buy the stock in question because of representations of White, and that he dealt with White supposing him to be the principal, and therefore, unless it is established by evidence which should have been satisfactory to the referee that White was acting as agent of the defendant, the conclusion arrived at by him is correct.

On the 22d day of November, 1879, the defendants, Boyce and White, entered into an agreement in respect to the sale of the stock in question upon the construction of which the rights of the parties to the action largely depend.

While it may be true that the plaintiff may not be precluded by this agreement from showing the true state of the relations existing between the defendant and White, yet if this agreement was entered into in good faith, for the purpose of defining and fixing those relations, and such agree-

ment does define and fix those relations, then it is entirely immaterial what the previous negotiations may have been, or what the previous relations of the parties may have been; their rights and liabilities in respect to themselves and to others are fixed by the terms of the agreement. In such case the agreement expresses the true relation of the parties to it, and this is the only question to be determined.

It is claimed by the appellant that by the transactions between the parties prior to the signing of this agreement, an agency had been created between them, and that this agreement does not contain the whole understanding and agreement between the parties to it, but only a part of it, and was really nothing but a detail in the execution of the agency conferred by Boyce upon White for the sale of the stock; and in support of this contention we are referred to the opinion of Mr. Justice DANIELS rendered upon a prior appeal in this case, in which he says: "While these letters do not in terms establish the agency, many statements are contained in them, rendering it probable that such was in fact the relation existing between these two persons."

This expression of opinion not only does not support the position of the appellant, but it is fatal to his contention when we come to consider the condition of the case when it was before this court on appeal before. The previous appeal was from a judgment entered upon the verdict of a jury against the defendant, and it was undoubtedly urged by the then appellant that there was no evidence to support the verdict of the jury, in that not only the agreement did not establish an agency, but the letters themselves did not even tend in that direction, and, therefore, the verdict should be set aside.

If the contents of the letters were capable of two constructions, or different inferences could be drawn therefrom, as the learned judge seemed to think, then the jury, having drawn one inference, such conclusion must prevail, even though the appellate court may think it erroneous.

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But, suppose a different conclusion has been reached in the court below, can a verdict, or a finding of a referee, be set aside upon the ground of probabilities? Must not the evidence disclose a reasonable certainty of error in the court below, before a result upon a question of fact can be disturbed? We think this is the rule. We imagine that if the verdict of the jury upon the previous trial of the case has been for the defendant, and the present appellant had been urging that the verdict of the jury was against the weight of evidence, and should, upon that ground, be set aside, the learned judge would have answered the argument somewhat in this wise:

"As those letters do not, in terms, establish the agency, although many statements are contained in them rendering it probable that such was, in fact, the relation existing between these two persons, and as a different inference might be drawn therefrom, it was exclusively the province of the jury to determine which was correct, and, although we might have come to a different conclusion, we cannot disturb their determination."

We are asked upon the present appeal to set aside the finding of the referee upon this point. This we should not do, unless we are satisfied that error has been committed, and it is not sufficient to justify such action that, if the case had been originally submitted to us for decision upon the record, as it now is, we would have come to a different conclusion.

The referee has had the benefit of hearing the witnesses give their evidence, which is of incalculable advantage in arriving at the truth where such evidence is conflicting, and his finding upon a question of fact should not be interfered with, unless there is a reasonably plain preponderance of evidence against it.

An examination of the correspondence prior to the execution of the agreement of November 22, 1879, shows that nothing had been agreed upon definitely between the

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parties. This correspondence was merely tentative, and the evidence justifies the referee in finding that the parties met together with their counsel on the 22d of November, 1879, for the purpose of definitely settling what the terms of their agreement should be, and reducing the same to writing, and it was done.

There is no pretense that there was any intention of concealing anything, and the origin of the paper, according to the testimony of Mr. White himself, arose from his desire to know beyond doubt what he could depend upon, and it was for this purpose that the agreement was executed. The terms of the agreement, therefore, so far as it fixed the relations of these parties, must control, and cannot be varied by expressions contained in correspondence preceding the agreement, which resulted in nothing, and because of which want of result the written agreement was called into existence.

When we come to consider the terms of this agreement, its provisions seem to be sufficiently definite and its terms reasonably certain.

But it is claimed that by the agreement White did not obligate himself in any way to take and pay for any of this stock, and therefore the relations between the defendants could not be that of vendor and vendee.

It is true that White did not obligate himself to buy and pay for a share of stock, but it did secure White so that the fruits of his labors, if successful, could not be taken away from him. The defendant, by this agreement, obligated himself to deliver to White certain shares of stock if paid for at a certain price named within given periods. What White did with the stock after its receipt by him was no business of his. At what price he sold it was none of his concern. The defendant agreed to take a given price, and when White tendered him that price he was bound to deliver the stock to him.

It is true that the agreement was only an option in favor

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of White, but when White exercised any part of this option, and stock was delivered pursuant thereto, he took it as purchaser, just as though he had bought; no option existing. And it may be that the defendant agreed to allow to White concessions upon the price named in the agreement, but this fact did not alter the relations of the parties. The defendant knew that White did not intend to acquire this stock for himself, but that he intended to sell it to others, and because of this fact, and because of the expenses that White would be put to in placing this stock, he may have agreed to make such concessions; but this did not constitute White the agent of the defendant, nor did it make White's transactions his, and it seems to us that if, upon this proof, the defendant had attempted to hold any of the subscribers to the stock procured by White upon their subscriptions, and had brought suit to recover the same, the subscriber, upon the proof now before the court, could have successfully claimed that he had made no contract with the defendant.

The subsequent agreement of March 3, 1880, in no respect changed the relation of the parties to the November agreement. It simply extended the November agreement with certain modifications therein named, and these modifications seem to strongly sustain the view which the referee has taken of the relations of the defendant and White.

The loose expressions of letters in which profits are spoken of as commissions, cannot change the exact and clear language of agreements deliberately entered into and made for the very purpose of fixing the rights of the parties, and which it is not pretended were entered into for any other purpose.

Upon an examination of the whole of the evidence, we can see no sufficient reason for disturbing the finding of the referee as to the facts in the case.

It now becomes necessary to consider some of the excep-

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tions taken to the admissibility of evidence, and which are called to our notice.

Objection was taken to the admission of letters showing transactions between White and the defendant, after White had sold stock to the plaintiff, and which it is claimed were inconsistent with White's claim that he was the agent of the defendant. It was competent to contradict the evidence of White by declarations made by White either in writing or by parol at any time, and which were inconsistent with his evidence. The mere fact that the plaintiff had trusted White, and bought stock of him, did not prevent the defendant when sued, because of White's alleged fraud, and which White attempted to fasten upon him by his own evidence, from showing that White had made declarations inconsistent with his testimony, even if such declarations were made upon the very day of the trial, or upon the trial itself. One of the most familiar methods of impeaching a witness is to show acts and declarations inconsistent with his evidence given upon the trial, and the fact that the witness is not a party to the action in no way impairs the availability of such impeaching evidence. Such evidence in no way impaired any right acquired by the plaintiff, but tended to show that Mr. White had, at the time of the trial, somewhat changed the views which he at one time entertained of the relations existing between himself and the defendant.

The receipt of the prospectus of the coal company was no error, as it was part of the transaction between the defendant and White.

The objection to the evidence of Messrs. Bush & Howitz cannot be sustained upon the ground now claimed, as no objection was made to the form of the question.

The objection to Mr. Howitz's testimony, that he was defendant's counsel, and, therefore, his evidence was incompetent, cannot be sustained, as the defendant himself put

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the questions by his counsel, and thus clearly waived the privilege.

There are no other exceptions which require special mention.

The judgment should be affirmed, with costs.

MACOMBER and BARTLETT, JJ., concur.

In the Matter of the Probate of the Paper-writing propounded as the Last Will and Testament of **CECILIA L. BOOTH**, Deceased.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Will. Execution.*—Writing the name only at the commencement of a will, instead of signing it at its conclusion is, at the most, uncertain and equivocal. In order to render it a sufficient signing, under the statutes of New Jersey, the decedent must make some reference to the name, as intended as her signature. There must be some proof on the part of the proponent that the name written in the instrument in this manner, was so written for, and intended as, the signature of the decedent.
2. *Will. New Trial.*—The court, where issues of fact on a probate proceeding have been framed and tried at the circuit, may entertain a motion for a new trial upon its minutes, or at a special term.
3. *Same. Motion for judgment.*—A motion at general term upon the verdict in such case, is premature during the pendency of an appeal from an order denying such new trial.
4. *Same. General issues.*—Where, on the probate of a will, several issues are framed and submitted to the jury, and their finding on one issue shows that they are prepared to find a verdict unsupported by evidence, a new trial should also be granted as to all the other issues submitted at the same time, though, as to those issues, the verdict is not contrary to the evidence.

Appeal from an order denying a motion for a new trial of issues, directed to be tried before a jury at the circuit.

B. F. Watson, for appellant.

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J. Stewart Ross, for respondent.

DANIELS, J.—This case is now before this court for the third time. See 9 N. Y. State R. 899; 13 Id. 344. On the first occasion it was brought up by an appeal from the decree of the surrogate, admitting an instrument to probate as the will of Cecilia L. Booth, dated on the 16th of June, 1884. The instrument was not subscribed by the decedent, and for that, as well as other reasons, its probate was resisted by her surviving husband. It was made at Long Branch, in the state of New Jersey, where the statute did not, as it does in this state, require a testamentary disposition of property to be subscribed, to render its execution legal and complete. What has been there required is, that the instrument shall be signed by the decedent in the presence of two witnesses, or the signature shall be acknowledged in the presence of the same number of witnesses, at the same time subscribing their names as witnesses to the document. The decree of the surrogate was reversed, and for the disposition of the questions in controversy, upon which the validity of the instrument, as a will, depended, issues were settled, as that has been directed to be done by section 2588 of the Code of Civil Procedure, to be tried before, and answered by, a jury at the circuit. These issues, for the most part, were quite formal, and were established by the evidence in favor of the proponent.

The earnest part of the controversy was directed to the disposition of the fourth and fifth of the issues directed to be submitted. By the fourth, the jury were directed to determine and answer whether the instrument was written by the decedent in the presence of two witnesses, who were present at the time and subscribed their names to the paper, as witnesses, in the presence of the decedent. This issue they answered in the affirmative. And the evidence which was given upon the trial by the two subscribing witnesses to the instrument, though differing from that given before

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the surrogate, was sufficient to sustain the conclusion of the jury contained in this answer.

By the fifth issue, the jury were in like manner directed to decide whether the name Cecilia L. Booth, contained in the first line of the instrument, was acknowledged to have been written, or made by her, in the presence of two witnesses present at the same time, and subscribing their names to the instrument in her presence. And to this, they answered that it was. This answer has been objected to as unsupported, as it was on the preceding appeal, by the evidence given upon the trial. The testimony of the witness Amelia Kurrus, who was one of the subscribing witnesses, was that the decedent informed her that she was about to make her will, giving her property to the proponent, who was her sister, and requested her to become a witness to the instrument. Her testimony is that she wrote one instrument, and discovering a mistake in it, tore it up, and then, in the presence of this witness, wrote the other, and read it over to the witness, and after reading it, requested her to sign her name, which she did. She did not observe the other witness to be present at the time, neither did she hear the decedent make any further reference to the instrument as a will. But after she had signed she stated that she saw Mamie Clifford, the other witness, sign her name. This other witness, in the course of her testimony, stated that she was present during the writing of the instrument, and that when it was completed the decedent said, "This is my will, take it and sign it." But neither of these witnesses stated that the decedent at any time referred to her name written in the first line of the instrument as her signature to it as a will. And it was chiefly because of the absence of testimony of this nature that it was before held that the jury could not, under the evidence, answer the fifth inquiry as they did and find that the decedent did acknowledge the writing, or making of, the name in the first line in the presence of the two witnesses.

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This decision of the court has been very earnestly objected to on the part of the proponent as having been erroneously made. And the cases of the Will of Higgins (94 N. Y. 554), and of the will of Phillips (98 N. Y. 267), are cited as maintaining this objection. And the still later decision in Matter of Hunt (18 N. Y. State Reporter, 118), is to the same effect. But they fail to do that. For in each of these cases the instrument was subscribed by the decedent, which of itself was an act directly indicating that the name was placed in the position occupied by it, as a signature to the instrument as a will. And this name in each instance was exhibited to the witnesses with the instrument itself when it was declared to be the will of the testator. The facts which transpired, therefore, were equivalent in those cases to the statement that the signature had been placed to the instruments to complete and authenticate them as wills. But writing the name of the decedent, as it was written in this instance, in the first line of the instrument, was at most no more than an equivocal act. It may, or may not, have been designed by the writer as her signature to the instrument. Ordinarily and commonly it would not be so regarded, for the common understanding of signing an instrument, is to place the signature at its end or termination. And that the decedent thought that to be requisite is evident from a similar instrument made by her on the 11th of June, 1884. This instrument was substantially the same as the one now in controversy. It was written by herself, and her name was made a part of the first line. But, in addition to that circumstance, when the instrument was completed she signed her name, adding her place of residence at the end, or foot, of the instrument.

From this it appears to have been her understanding, that to make a complete instrument for the disposition of her property, the signing that was necessary was a signing at the conclusion of the instrument. And there was reason to infer, although such a signing was not necessary

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to the validity of the instrument as a will, that the omission of the decedent to sign the paper in controversy, which was made on the 16th of June, 1884, as she had the preceding instrument, arose out of inadvertence, or inattention on her part. The first instrument was sent by her to the proponent, but it was not witnessed; and that created the necessity for making another, and led to the writing of the one now in litigation.

Writing the name only at the commencement of the instrument, instead of signing it at its conclusion, presented an entirely different case from those referred to. For placing the signature at the end of the instrument is an act carrying with it the assurance that it was placed there to complete and give effect to the instrument. While placing it only at its commencement may have been designed for no more than a description or reference to the person writing and intending to make the instrument. It is, at the most, uncertain and equivocal. That may have been the design of the decedent, or, by placing it there in that manner, she may have intended it for a signature to the instrument as a will. And it was to meet and determine this condition of uncertainty that the fifth issue was drawn and submitted to the jury. And when that is the description of the instrument propounded for probate, there is good reason for requiring some reference by the decedent to the name, as intended for a signature, to justify the finding of the fifth issue in the affirmative.

Before the revision of the statutes of this state in 1830, what was rendered necessary to make an instrument valid as a will was that it should be in writing and signed by the party making the same, or by some person in his presence, and by his express direction, and that it should be attested or subscribed in the presence of such party by three or more credible witnesses. 1 R. S., 1813, 364, § 2.

And by earlier legislation in England, a mere signing by the party was all that was required. This legislation was

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the origin of the act just mentioned, and it was followed in other states of the union in their early legislation.

But it was changed in this state by the revision of the statutes requiring the instrument to be subscribed—that is, placing the signature at the end or termination of it; and the same change by legislation has been made in England and in other states. This legislation was, without doubt, prompted by the fact already mentioned, that writing the name at the commencement of the instrument, as it was in this instance, was not a certain indication that it was placed there, intending that it should be the signature of the party to the instrument. It was regarded as being too equivocal for the certainty required in making a testamentary disposition of property; and owing to this uncertainty the authorities have required, where a like point has arisen in the course of litigation, that some evidence should be furnished to maintain the instrument as a will, by proving the fact to be that writing the name in the body of the instrument was intended to be the signature of the party whose name was so written. This was considered to be the law in *Ramsey v. Ramsey* (13 Grat. 664) and *Catlett v. Catlett* (55 Missouri, 330). The same subject was generally examined in *Adams v. Field* (21 Vt. 256) and *Armstrong v. Armstrong* (29 Ala. 538).

But there no acknowledgment was required to be made of the name as a signature to sustain the instrument as a will; but in this instance an acknowledgment of the name itself, as a signature, was considered to be requisite to sustain the instrument as a will, and for that reason the fifth issue was propounded to meet this necessity. And in the *Matter of the Will of McElwaine* (3 C. E. Green, N. J. 499), it was held that proof of compliance with the four requisites mentioned in the New Jersey statute was essential to sustain an instrument as a will; and this was sanctioned and followed in 15 N. J. Eq. 290, 293, holding where there was no attestation clause, as there is none in

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his case, that proof of the requisites mentioned in the statute must be made.

The same conclusion was followed in *Allaire v. Allaire* (37 N. J. Law, 312, 326; affirmed, 39 Id. 113). And there is certainly good reason for requiring as much as that, in order to establish this equivocal writing of the name as a signature. It may or may not have been so designed. And evidence to prove that it was so intended, is required by this issue, as well as these authorities, to be supplied by the proponent. A similar view of the law was taken in the decision of *Remsen v. Brinckerhoff* (26 Wend. 325), when in the opinion of NELSON, C. J., it was said that "four distinct ingredients, as declared, must enter into and together constitute one entire complex substance essential to the complete execution.

"*First.* There must be a signing by the testator at the end of the will.

"*Second.* The signing must take place in the presence of each of the witnesses, or be acknowledged to have been made in their presence.

"*Third.* The testator, at the time of signing, or acknowledging, the writing, shall declare it to be his last will; and,

"*Fourth.* There must be two witnesses. Now, it is obvious that every one of these four requisites, in contemplation of the statute, is to be regarded as essential as another, that there must be a concurrence of all to give validity to the act, and that the omission of either is fatal." Id. 331. The case, in this respect, applies the law even under the present statute of this state, in the same manner as it was sanctioned by these decisions of the court of New Jersey, And this was further followed in *Lewis v. Lewis* (1 Kernan, 220). In the course of the decision of that case, all the statutory requisites were required to be observed and proved, as they were by the decision of the case last referred to. And it was held that, "the formalities, prescribed by statute, must be observed, and the attesting wit-

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nesses must be informed at the time, and by the testator, or in his presence, and with his assent, and have a knowledge of all the facts necessary to a due execution and publication of the will, and to which they are called to attest. If the party does not subscribe in their presence, then the signature must be shown to them and identified, and recognized by the party, and in some apt and proper manner acknowledged by him as his signature." *Id.* 225. And the same rule was as distinctly announced in the decision of *Sisters etc., v. Kelly* (67 N. Y. 409, 413). And there was no departure from it, as to an instrument of this description, by either of the later decisions of the court of appeals, or the decision made in *Baskin v. Baskin*, (36 N. Y. 416). Neither was there in *Matter of Austin* (45 Hun, 1; 4 N. Y. State Rep. 666); for it there appeared, as a matter of fact, that the decedent had subscribed the instrument, and that his signature, so appended, was in plain sight when the witnesses were asked to subscribe it as a will.

In *Matter of Hunt* (42 Hun, 434; 3 N. Y. State Rep. 346), the facts were substantially the same. And *Matter of Beckett* (103 N. Y. 167), sanctions no departure from the rule previously announced, where the instrument has not been subscribed by the decedent as it was not in this instance. As to this class of cases, no disposition has been manifested anywhere to relieve the case from the observance of the rule declared and sustained by these earlier authorities. What that rule requires, and was required to justify, the answer which was given to the fifth issue, is some proof on the part of the proponent that the name written in the instrument in this manner, was so written for, and intended as, the signature of the decedent. There was no such proof in this case as this issue required to be submitted, and the verdict of the jury, answering that as they did, was unwarranted, and should be set aside. The other answers were sufficiently sustained by the evidence to support the conclusions of the jury. And it will simplify

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a further trial and disposition of the fifth issue, to require only that particular issue to be again submitted to and decided by a jury. It will simplify the evidence, as well as the inquiry required to be decided, which in this instance, was complicated and obscured by the intricate requests made to the court for further directions, after the charge had been clearly given to the jury. By trying this issue separately from the others, this obscurity will necessarily be avoided, and the jury will be able, intelligently, to apply the evidence to its disposition, which they do not, so far, appear to have done, and the court can require such an answer as will be consistent with and supported by the proof.

Section 2588 of the Code requires the questions of fact arising in this controversy to be tried by a jury, and they must accordingly be so disposed of. But an answer, unsupported by proof, has not been permitted to be given and, after a trial has taken place, it has been declared that a new trial may be granted, as prescribed in section 2548 of the Code. This section, 2548, has empowered either the surrogate, or the court in which the trial has taken place, to order another trial. And as the trial took place at the circuit, the supreme court has also been authorized to direct another trial of the issues. These sections supplied ample authority for the court, before which the trial took place, to entertain the motion, which was made upon its minutes, for a new trial, and as to this issue the motion should have been allowed to prevail, for as the evidence did not tend to prove the fact that writing the name of the decedent as it was written, was stated or acknowledged to be her signature to the instrument, the jury were not warranted in returning the answer which they did.

The order from which the appeal has been taken should, accordingly, be so far reversed, with costs to the appellant to abide the event, as to direct the further trial of this fifth

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issue, and to deny the motion as to the other issues which have been answered by the jury.

It being apparent from the answer given by the jury to the fifth issue that they were prepared to find a verdict unsupported by evidence, they certainly were not in a condition of mind to render an impartial verdict as to the fourth issue, and, therefore, a new trial should be granted as to all the issues.

VAN BRUNT, Ch. J., and BARTLETT, J., concur.

Motion on behalf of Joseph A. Booth, contestant, for a new trial on a case containing exceptions.

B. F. Watson, for contestant.

J. Steward Ross, for proponent.

DANIELS, J.—The motion for a new trial has been made and brought to a hearing upon the same evidence and objections presented in support of a like motion before the judge presiding at the trial of the issues to set aside the verdict and direct a new trial. It has been held, as it was upon a preceding appeal, that the motion could regularly be brought on either before the judge presiding at the trial, or at a special term, under the practice prescribed by section 2588 of the Code of Civil Procedure, and the other section therein referred to. On an appeal from the order denying a new trial, the case has again been examined and its proper disposition thereupon indicated. That entirely dispenses with the consideration of this application, which, under the circumstances, should be dismissed, without costs.

I do not find that under section 2548, the circuit court had any power to entertain a motion for a new trial.

In case of a trial at the circuit, of issues framed, the motion for a new trial must, it seems to me, be made in the supreme court.

VAN BRUNT, Ch. J., and BARTLETT, J., concur in the result.

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Motion for judgment upon the issues tried before and answered by the jury in this case.

J. Stewart Ross, for proponent.

B. F. Watson, for contestant.

DANIELS, J.—This application has been prematurely made. The case is not in a condition for its consideration by the court until the issues themselves, upon which the instrument propounded as a will has been made dependent, shall be finally disposed of by the court. Such a final disposition has not yet been reached, and this application accordingly should be denied, without costs.

VAN BRUNT, Ch. J., and BARTLETT, J. 5 concur.

In the Matter of the Last Will and Testament of DANIEL R.
LIDDY, deceased.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Will.*—A will, wherein the testator gives to his wife all his property in preference to his brothers or sisters, is not an unnatural one, especially where he was mainly indebted to her bounty for his property.
2. *Same. Reversal of probate.*—Grave doubts should remain unremoved and great difficulties oppose themselves to the upholding of the decree admitting a will to probate before a reversal should be made by the general term.
3. *Evidence. Burden of proof.*—The burden of proof that a testator is *non compos mentis* rests upon the party who alleges it.
4. *Will. Proof of execution.*—Though the subscribing witnesses to a will do not agree to all the details attending the prominent features of the execution, are not entirely in harmony as to the manner in which the execution of the will took place, and manifested some interest in getting the will executed, yet, if all testified to necessary circumstances from which due execution must necessarily be found, the general term will not reverse the

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surrogate's decree admitting the will to probate, so as to refer the question to a jury.

5. *Same. Undue influence.*—The mere fact that a wife has exercised influence upon her husband in relation to the disposition of his property, by will or otherwise, in no way supports the proposition that fraud, undue influence or duress has been employed.
6. *Same. Fraud.*—Nor is the fact that a stranger was sent for, in order to draw the will, a badge of fraud, though one of the testator's brothers, who was in the house at the time, was a lawyer and able to perform the professional duties necessary for the execution of the will.
7. *Evidence. Subscribing witness.*—A subscribing witness may speak of the sanity and condition of the testator at the time of executing the will, and that he was not under restraint.
8. *Same. Medical testimony.*—The testimony of a medical witness in response to hypothetical questions, not justified by the evidence, is not entitled to any consideration.

Appeal from a decree of the surrogate admitting a will to probate.

Ira Shafer, for appellant.

F. R. Coudert, for respondent.

VAN BRUNT, P. J.—Upon the offer for probate of the will in question, the appellants objected to its probate upon the grounds that the paper propounded as the last will and testament of Daniel R. Lyddy, deceased, was not his last will and testament; that the deceased did not subscribe to said paper in the presence of each, or both, of the alleged contesting witnesses thereto, nor acknowledge the subscription of said paper writing, nor declare the same as, and for, his last will and testament; that each of the attesting witnesses did not sign his or their name as a witness or witnesses thereto at the end of said propounded will at the request of the deceased; that at the time of the execution of said propounded will the deceased did not have testamentary capacity to make the same; and that it was procured, or caused to be procured, by fraud and conspiracy to

defraud, and undue influence practiced upon said deceased by his wife, Mary A. Lyddy, the proponent and others, and that the said propounded will is an unnatural will in any event.

After a careful examination of the evidence, we have come to the conclusion that there is no reason for disturbing the conclusion at which the surrogate has arrived.

In stating the means by which this conclusion has been reached, it will be impossible, within reasonable limits, to discuss at all in detail the evidence produced before the surrogate; but a few general suggestions will be offered which tend to show, in our judgment, that the position which the contestants have in reference to the relative claims of the parties upon the testator, and the circumstances under which this court should reverse the decree of the surrogate, is not well founded.

In the first place, the will is not an unnatural will, in that the testator has given to his wife all his property. Under the circumstances disclosed, in this case, showing the relations existing between the testator and his wife, the entire confidence reposed, each in the other, the fact that to a considerable extent, at least, the testator owed that which he possessed and had a right to will to the bounty of his wife, it does not seem at all unnatural that he should have recognized when he came to make a disposition of that of which a large part he had received from her.

It is true that it is claimed by the contestants that there is little or no evidence of the fact which is hereinbefore stated. But it seems to us that the evidence of disinterested witnesses, as to the declarations made by the testator himself, under the circumstances testified to, cannot be ignored in determining the question as to whether the testator has made an unnatural will or has failed to recognize the claims of those who were nearest and dearest to him. It would seem, under the circumstances, that an unnatural will would have been to have ignored the claims which his wife had

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upon him, because of her bounty and generosity towards him. The fact that he had brothers, gave them no claim upon his estate. His wife should be, and was undoubtedly, nearer to him than his brothers or sisters, and it was by no means unnatural that he should give to the person who was the dearest to him on earth all that he possessed.

There is another erroneous view which, it seems to us, has been indulged in upon the part of the contestants; and that is as to what was necessary to call upon the general term to reverse the decree of the surrogate admitting the will to probate. It is claimed that if a doubt as regards the facts exists in the minds of the appellate court, they are, therefore, called upon to reverse the decree, and have the questions involved passed upon by the proper tribunal for that purpose, namely, a jury.

Although a doubt might perhaps justify such action, yet the existence of simply a doubt by no means calls upon the general term to take such action; and where the surrogate has had the benefit of hearing the oral testimony of the witnesses, it seems to us that there should be more than a doubt, arising from the perusal of the testimony, to justify a reversal; and that although it is not the duty of the court to strain after probate, nor, in any case, to grant it where grave doubts remain unremoved, and great difficulties oppose themselves to so doing, where simply a doubt exists it seems to us it is the duty of the court to affirm the action of the surrogate.

It is necessary, as was laid down in the case of *Delafield v. Parish* (25 N. Y. 35), to which the contestants refer, that grave doubts should remain unremoved, and great difficulties oppose themselves to the upholding of the decree, before a reversal should be made by the general term. Applying these rules to the facts disclosed by the testimony, is there anything upon this evidence which raises grave doubts as to the correctness of the decision of the surrogate, or great difficulties in upholding such decision?

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After a perusal of the evidence herein, and a comparison of the record, with the points made by the contestants, we fail to find such grave doubts or such great difficulties.

First. In regard to the execution of the will, it is claimed that the evidence of the witnesses who swore in regard to the fact of its execution is entirely unreliable and not worthy of credit, although uncontradicted, because of the contradictions contained in the evidence of these witnesses themselves, as to some of the events attending its execution, and because of the manifest interest displayed by some of the witnesses in getting the will executed.

Taking the testimony of each witness by itself, it discloses the performance of acts showing a signature of the will by the testator, showing a declaration of the will, and a request of the witnesses to sign, and a signature by those witnesses in the presence of the testator. These facts, in different forms, are testified to by all the witnesses.

It is true that they do not agree as to all the details attending the prominent features of the execution, and are not entirely in harmony as to the manner in which the execution of the will took place. But they each and all swear to necessary circumstances from which due execution must necessarily be found if such evidence is true.

Now the question arises, is that evidence to be disregarded because of any probability arising from the testimony itself, or because it is impeached by the contradictions of the witnesses themselves in reference to the facts of the execution, and also to the circumstances attending such execution. We think that the very fact that these witnesses have disagreed in some of the minor particulars in reference to the execution of the will is an evidence of the truthfulness of their narrative. They were not regarding the minor features attending its execution, and their attention was directed to the fact of the execution itself and that alone. Whether the testator was bolstered up in the bed at the time the witnesses came into the room, or whether he was

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raised by one of the witnesses after he got there, for the purpose of executing, is not a material circumstance, and because they disagree in regard to this, it does not necessarily impeach their testimony, because no two witnesses ever described a series of events culminating in the execution of a paper or in any other fact or incident, that ever agreed in their description of the attendant circumstances. So in regard to the production of the writing materials, and whether a book was produced or not, and by whom, and the various other minor details which are dwelt upon with such great stress as showing the fact that these witnesses were unreliable.

These discrepancies in the testimony in regard to these facts clearly in no way impeached the value of the testimony in respect to the necessary facts to be established in order to show that there has been a due execution of this will. As the learned surrogate has put it, it is necessary to find that all these witnesses have deliberately perjured themselves before we can come to any other conclusion than that the will was properly executed as far as the forms of law are concerned; and there is nothing upon this record which in any way called upon the surrogate, or calls upon us to come to the conclusion that perjury has been committed.

The next objection is that the testator did not possess testamentary capacity, and we are referred to the testimony of the nurse, Sister Regina, Doctor Hamilton and the brothers of the testator, in support of this objection. As far as the testimony of Dr. Hamilton is concerned, it seems to us that it is entitled to no consideration, because the hypothetical questions which were put to him were not justified by the evidence. The assumption throughout his examination was that the witness whose evidence it was claimed formed the basis of the questions put to him, intended to convey the impression by her testimony that at the time she left the testator on the morning of the day upon which the

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will was executed, the testator was too weak to carry on any conversation. It is true that she made use of that language in her testimony, but immediately after she qualified it, and when the interrogatory was repeated, "Do you think he was able to carry on any conversation?" she answered, "I do not know, I cannot tell, because I did not try." And it was further assumed that the delirium under which he was suffering during the night continued until the witness left at half-past nine in the morning, the will being executed within an hour or so thereafter, whereas the testimony shows that in answer to the question whether he was delirious the whole night until six o'clock in the morning, the answer of the witness was, not all the time; he was not delirious all the time. And when she is asked if the delirium continued off and on during the night to about six the next morning, she answers, "Yes."

Thus showing that the delirium terminated, instead of within half or three-quarters of an hour of the time of the execution of the will at least four hours before, and that at the time the witness left him, at half-past nine o'clock in the morning, he was perfectly conscious, and knew the witness perfectly well and bade her good-morning, and that his voice was pretty well, then. As the questions put to Dr. Hamilton were based upon the theory that the delirium continued until within half or three-quarters of an hour of the execution of the will, it is clear that this evidence can have but little weight in determining the question as to whether the deceased had testamentary capacity.

The same is true in regard to the testimony of the brothers who claimed to have heard the noises at the time at which the testator was suffering from this delirium. It is clear, from the evidence of the nurse, that at half-past nine, when she left him, he was perfectly conscious, his voice was good, and he bade her good-morning, showing that the delirium had departed and his normal mental condition had returned. Now, in respect to this question of mental incapacity, it is

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necessary that the contestant should establish the fact.

It is true that the burden of proof in all cases rests upon the proponent of a will to prove that the testator was, at the time of the making the document propounded as his will, of sound and disposing mind and memory ; but it is also equally true that at common law and under our statutes the legal presumption is that every man is *compos* and that the burden of proof that he is *non compos mentis* rests upon the party who alleges that an unnatural condition of mind existed in the testator. Therefore, when the contestants in this case allege a want of testamentary capacity, they are bound to produce such evidence as will overcome the presumption of mental capacity. We have in the case before us the evidence of the subscribing witnesses as to the condition of the testator. If that evidence is true, then the testator had testamentary capacity.

The only evidence which it is claimed conflicts with this is the evidence of the nurse, which, as already seen, does not; the evidence of Dr. Hamilton, whose opinion as an expert was based upon supposed facts, which are not borne out by the testimony ; and the evidence of the three brothers, whose testimony in no way tends to show that at the time of the execution of the instrument the testator was not possessed of his right mind and faculties and capable of making the will in question.

The objection as to fraud, undue influence and duress seems also to be equally untenable. Undue influence, fraud and duress must be proven, as any other part of the contestant's case.

The mere fact of proof that a wife has exercised influence upon her husband in relation to the disposition of his property by will or otherwise, in no way supports the proposition that undue influence has been exercised. Influence may always be exercised, and it is proper that it should be exercised, but it only becomes improper when it becomes undue, and it becomes undue when it substitutes the will

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of the person exercising the influence for the will of the person who is to do the act. Arguments, persuasions and suggestions may be made, so long as the person who is to do the act can weigh the suggestion and has the ability, if so minded, to resist the influence; then there is nothing undue in regard to it, although he may yield to it. And even if there was proof in this case that the proponent had requested the testator to make this will in her favor and urged him to do it, it would have been no ground for finding that the influence which she exercised in the making of the will was such as to impeach the integrity of the instrument; and it would seem that the relations of the parties go to show beyond all question that no such influence was necessary in order that this will should be executed.

It appears that large portions of property were held by the testator and his wife, as joint tenants. There seems to have been an intention between them that the survivor should have the whole property. The will in question was drawn long anterior to the time of his death, and although not executed, the purpose was declared by the testator that upon his death his wife should have all his property.

These facts show upon his part an intelligent purpose and that the execution of the will was simply the carrying out of that purpose at a time when it became necessary for him to act because of the imminent danger he was in, and because had he not made the will, the very property which his wife had given to him would be out of her possession.

There is no evidence whatever to sustain the proposition that fraud or duress was resorted to for the purpose of procuring the execution of the will. There is not a particle of evidence of duress; and the only scintilla of evidence which might go to support the allegation of fraud is the evidence that the proponent stated to the contestants that the testator had asked her to send for his brothers and that she told him she had done so, which was true, and that they had not

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come, which was untrue. The very fact that the proponent stated this to the brothers, of which they would have had no knowledge, otherwise shows that what she did in that regard was not done with a fraudulent intent. If she had made this statement to him for the purpose of keeping them out of the way in reference to the execution of the will, does any human being suppose that she would go to the very persons she had thus defrauded and tell them of the fact entirely unnecessary as it was? She claimed that he was too ill to see them, that it would excite him and that it was not for his benefit that they should see him, and that was the reason they were not invited into the sick room. When it became evident, however, that he was dying they were then invited into the room, and at least one of them saw him upon more than one occasion.

It is claimed, as a badge of fraud, that a stranger was sent for the purpose of drawing this will, and although these brothers were in the house and one of them at least was a lawyer and able to perform the professional duties necessary for the execution of the will. It seems that when the testator desired to have a will drafted he did not go to his brother, but preferred a stranger; and it would appeal therefore, in not employing the brother, his wife was acting in accordance with her husband's own preference.

If he did not go to his brother when he wanted his will drawn, preferring to have some stranger, as he naturally would under the circumstances, the fact that the wife acted in precisely the same way constitutes no great badge of fraud.

It seems to be needless to discuss the evidence further, because, within the limits of an opinion, it is impossible to refer to the same in detail, and we can only, in a general way, state the impressions which a reading of the evidence has made upon our minds. We think, from the evidence, that no grave doubts, such as would justify this court in reversing the decision of the surrogate, exist.

Our attention has been called to various exceptions to evidence, especially to the questions put to the subscribing witnesses, as to their opinions as to the competency and sanity of the testator.

It is undoubtedly true, the general rule is that witnesses must speak of facts alone, and may not draw opinions, conclusions or inferences. But to this rule there are exceptions, and one is that the subscribing witness to a will may speak of the sanity of the testator at the time of executing the will, and also to the condition of the testator at the time or that he was not under restraint.

The position of the subscribing witnesses, in this respect, is well recognized as entirely different from that of other persons, and their opinions upon these subjects are received precisely the same as those of experts.

None of the other exceptions seem to call for special mention, as none of them are of sufficient importance, even if well taken, to justify a reversal of the decree, as the evidence admitted under the objections was not of such a character as necessarily to prejudice the contestants.

The decree should be affirmed, with costs.

ALLEN, J., concurs.

WILLIAM H. YEANDLE *et al.*, Appellants, v. CELESTIA
YEANDLE, Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Evidence.*—In an action brought by the heirs at law to set aside a conveyance of property made by the deceased grantor, on the ground of fraud and undue influence exercised by the grantee, it is competent for a witness, who had known the deceased grantor and had business dealings with him for six years, and up to two years of the time of the execution of the deed, to state whether the decedent took part in certain conversations to which his testimony had been directed. This was strictly and exclusively a matter of fact.
2. *Same. Matter of fact.*—So, whether the witness had observed any difference in the grantor's manner, or his disposition to talk about business, is a fact, and its exclusion was error.
3. *Same.*—A witness may, after giving the details, characterize the act or conversation of a testator or grantor as rational or irrational.

Appeal from a judgment entered upon the decision of the court.

Marshall P. Stafford, for appellants.

Edward S. Corlier, for respondent.

DANIELS, J.—The action was brought by the plaintiffs, as the heirs-at-law of William Yeandle, who died on the 9th of July, 1885, to set aside a conveyance of property made by him to Eliza H. Hobart, and by her conveyed to the defendant, who was, at that time, the wife of William Yeandle. The deeds were executed and delivered on the 16th of April, 1880, when the defendant's husband was of the age of about seventy-five years. Both his mind and health were at that time impaired, and the plaintiffs, to maintain their action, alleged that he was induced to exe-

cute the deed, by the fraud and undue influence of the defendant. And evidence was given upon the trial tending to establish the fact that the defendant had induced him to convey the property, by operating upon his fears concerning his liability to a suit to recover an amount owing for the board of his daughters by a preceding marriage. This theory was resisted in behalf of the defendant, who claimed that the deed was executed by him in satisfaction of money which she had paid out and used for his benefit. Upon neither side, however, was the evidence decisive as to the right of the parties, but the case presented was one of fact, upon conflicting proof, to be determined by the court.

In the early progress of the trial, Joseph J. Yates was examined as a witness on behalf of the plaintiffs. He had been employed in his business by the deceased grantor in the deed, and had known him from 1872 until 1878. He had conversations and business dealings with him and had observed his condition, and states that he was informed by the defendant that her husband was physically and mentally disqualified from doing business. That, however, she denied in the testimony given by herself upon the trial. But the facts still remained, without contradiction, that this witness had known and observed, and had dealings with, the deceased grantor, extending through a period of at least six years, and to within no more than two years of the time when the deed was executed. This witness was asked a series of questions, which were objected to on the part of the defendant, and the answers were excluded. These questions were put to him in the following language:

Q. Did he take part in the conversation that occurred on the occasion when he and she came out there together? Objected to; objection sustained; exception.

Q. Did you notice any difference in Mr. Yeandle's manner or his disposition to talk about the business, between the time he first came to you and the occasion on which you

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last saw him? Objected to as calling for the opinion of witness; objection sustained; exception.

Q. State any difference you noticed, if you noticed any, in the manner of Mr. Yeandle, or in the manner of his conversation, between the time you first saw him and the time you last saw him? Objected to; objection sustained; exception.

Q. What change, if any, did you notice in the manner of Mr. Yeandle between the times when you first and last saw him? Objected to; objection sustained; exception.

Q. Describe the manner of Mr. Yeandle, in talking with him about business matters, when you first saw him, as compared with his manner in talking about business the last time you saw him?

Objected to; objection sustained on the ground that it was not competent for the witness to testify to a conclusion of that kind; he must state the facts; exception.

The questions, it will be observed, did not ask the witness to express any opinion concerning the condition of the grantor in the deed, but the inquiries were as to facts:

First, whether he took part in the conversation that occurred on the occasions to which his testimony had been directed. That was strictly and exclusively a matter of fact. And by the other questions, he was asked whether he had observed any difference in the grantor's manner, or his disposition to talk about business. These were all inquiries concerning facts to which the attention of the witness was expressly directed. And it was entirely competent for him to give the evidence expected in this manner to be obtained. And excluding the answers to these questions was error on the part of the court. The witness was further asked whether what Mr. Yeandle said, or did, on the occasion of the last few visits to him at Elizabeth left any impression on his mind as to his being rational, or irrational. This was objected to generally, without any intimation that the question was, in any respect, wrong in

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form, and the answer of the witness was excluded. He was then asked to state anything he saw Mr. Yeandle do, or heard Mr. Yeandle say, that made any impression on his mind as to his being rational or irrational. This was in like manner objected to, and the answer of the witness excluded. And exceptions were taken to the exclusion of these answers. Why the plaintiff should have been prevented from obtaining answers to these two questions does not otherwise appear in the case. And the ruling excluding the answers is at variance with those made for the conduct of the examination of other witnesses, both on the part of the plaintiff and on the part of the defendant.

The questions called for no general expression of opinion on the part of the witness, but they directed his attention particularly to specified occurrences mentioned by him in the course of his preceding evidence. And as to those occurrences, it was intended to do no more than to take his answer as to the indications left by them upon his mind, concerning his conclusion, whether they were or were not rational in and of themselves. And that was strictly within the rule which has been repeatedly settled by the courts upon this subject. *Howell v. Taylor*, 11 Hun, 214; *Hewlett v. Wood*, 55 N. Y. 634; *Yeandle v. Yeandle*, 13 N. Y. State Rep. 586.

The error brought into the case by the exclusion of these answers cannot be disregarded. Neither can it be corrected in any other mode than by a further trial of the action. The judgment should, therefore, be reversed, and a new trial directed, with costs to the appellant to abide the event.

VAN BRUNT, Ch. J., and BRADY, J., concur.

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**JAMES H. McVICKER, Appellant, v. ITALO CAMPANINI,
Respondent.**

Supreme Court, First Department, General Term, May 24, 1889.

1. *Attachment. Affidavit.*—An affidavit on personal knowledge, where the affiant, not a party, fails to state the facts which tend to show such personal knowledge, is insufficient to procure an attachment.
2. *Same.*—Where an affiant does not necessarily have knowledge, and where he cannot be presumed to know the several facts attempted to be established by his affidavit, such affidavit furnishes no legal evidence of their existence.
3. *Same. Information and belief.*—If the affidavit is made upon information and belief, the sources of the information and the grounds of the belief must be stated; and if the information is acquired from another person, his affidavit must be furnished as the legal evidence of the fact, or its non-production excused by showing the impossibility of obtaining it.
4. *Same. Office of affidavit.*—The office of an affidavit is to furnish evidence; and, unless the affidavit contains legal evidence conferring jurisdiction upon the court, and it appears upon the face of the affidavit that the court had jurisdiction, an order based upon such an affidavit will be set aside.

Appeal from an order vacating attachment procured upon the ground of the defendant's non-residence.

A. J. Dittenhoefer, for appellant.

F. Bien, for respondent.

VAN BRUNT, P. J.—The attachment in question was procured upon the affidavit of the son of the plaintiff. He states in his affidavit that he is the son of the plaintiff, and that he is acquainted with and has knowledge of the facts hereinafter set forth; and then alleges the facts upon which the attachment was granted. A motion to vacate the attachment was made upon the papers upon which it was granted, based solely upon the ground that the affiant did

not state the grounds of his knowledge and the sources of his belief. This motion was granted, and from the order thereupon entered this appeal is taken.

The ground claimed by the appellant to support the attachment is that the affidavit is not upon information and belief, but by an affiant who has personal knowledge, being acquainted with and having knowledge of the facts set forth in the affidavit.

One difficulty with the position of the plaintiff is that there is nothing in the affidavit to show that the affiant had personal knowledge of the facts.

It is true, it states, that he is acquainted with and has knowledge of the facts set forth; but how he became acquainted with, and how he acquired knowledge in respect to those facts, the affidavit is entirely silent. It nowhere appears that he was a party to the contracts in question. It nowhere appears that he was present when the contracts were entered into. But it appears that he is the son of the plaintiff, and from that we are called upon to infer that he has personal knowledge of and acquaintance with all his father's business affairs. We think this is too violent an assumption to entertain. Where a party has deposed to facts, of which, upon the face of the papers, it appears that he has not necessarily personal knowledge, it is necessary for him to state the facts which tend to show that he has such personal knowledge of the facts as authorizes him to make the affidavit. Where an affiant does not necessarily have knowledge of, and where he cannot be presumed to know, the several facts attempted to be established by his affidavit, such affidavit affords no legal evidence of their existence.

In the case of *Tim v. Smith* (98 N. Y. 87), the court of appeals lay down the statutory rule which recognizes the fact that in order to entitle the court to act upon the affidavit, legal evidence of the facts to be established must be furnished by such affidavit. In the case cited, the affidavit

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was made by the attorney, and it was there held that unless it appeared that an attorney had acquired such knowledge of the several facts required to be proved as entitled him to give legal evidence of their existence, his affidavit should be disregarded.

In the case at bar there is no proof whatever that the affiant could give a single particle of legal evidence in respect to transactions in which he does not appear to have been a participant. It is not enough that the affidavit should be made upon information and belief. If the affidavit is made upon information and belief, the sources of the information and grounds of the belief must be stated; and if the information is acquired from another, his affidavit must be furnished as the legal evidence of the fact, or its non-production excused by showing the impossibility of obtaining the affidavit. The office of an affidavit is to furnish evidence. Courts are presumed to act upon legal evidence; and unless the affidavit contains legal evidence conferring jurisdiction upon the court, and unless it appears upon the face of the affidavit that the court had jurisdiction to act, if action is taken upon such affidavit, it should be set aside.

We think under the rule laid down in the case cited, the affidavit in question was entirely deficient in that it nowhere appeared that the affiant had personal knowledge of the transaction. And even if he had sworn that he had personal knowledge, it would have been insufficient without showing the facts and circumstances from which he concluded that he had such personal knowledge.

It is for the court to determine from the legal evidence which the affiant places before it in the affidavit, as to whether he has that personal knowledge which justifies him in making the affirmation.

The order should be affirmed, with ten dollars costs and disbursements.

MACOMBER and BARTLETT, JJ., concur.

PEOPLE OF THE STATE OF NEW YORK, Respondents, v.
STANLEY MOREHOUSE, Appellant.

Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Arrest. Private person.*—A person, not an officer, is authorized by law to arrest a party for a crime committed in his presence, upon immediate pursuit.
2. *Same. Assault.*—The fact that defendant raised a gun to his shoulder, cocked, pointed it towards a person and threatened to shoot him if he came any further, constitutes a crime, for which a private person, if done in his presence, has a right to arrest the defendant, if he proceeds promptly.
3. *Trial. Charge.*—A refusal to charge the jury that, "if the gun was not loaded at the time he pointed it at Decker, no crime was committed, and the defendant must be acquitted," was not error.

S. S. Taylor, for appellant.

Edgar Denton, for respondents.

MARTIN, J.—This is an appeal from a judgment of the court of sessions of Chemung county, on the conviction of the defendant of assault, in the second degree, and from an order denying a motion for a new trial. The indictment was for assault in the first degree. The offense was committed at the village of Wellsburg in that county, on the 4th day of November, 1886.

On the day named, the defendant met Edward Decker on one of the streets of the village, ordered him to stop, raised a gun to his shoulder, cocked it, pointed it towards Decker, and threatened to shoot him if he came any further. Decker stopped, and returned to one of the hotels "as quick as he could," obtained a gun, and, with others—including a trustee of the village, a police officer and James

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Welch—proceeded to a barn to which the defendant had fled, for the purpose of arresting him for his assault upon Decker. While these persons were attempting to arrest the defendant, he pointed his gun towards Welch, and threatened to shoot him if he came nearer. The defendant admitted that the gun was loaded and cocked, and there was other proof that tended to show that fact. The defendant was convicted of an assault upon Welch.

The defendant contends that his conviction was not justified by the evidence; that the evidence failed to show that the gun was loaded when he pointed it at Welch. This contention cannot be sustained, as the undisputed proof was that the defendant admitted that it was cocked and loaded; besides there was other evidence which tended to show that such was the fact. The evidence was sufficient to justify the jury in finding that the gun was loaded when pointed at Welch.

The defendant also contends that Welch was a trespasser in attempting to arrest him, and that he was, therefore, justified in using the means employed to prevent his arrest. Although Welch was not an officer, still he was authorized by law to arrest the defendant for a crime committed in his presence (Code Crim. Pro., § 183), and without informing him of the cause for arrest, if pursued immediately after the commission of the crime. Code Crim. Pro., § 184. Welch was present when the defendant pointed his gun at Decker and threatened to shoot him. If that act constituted a crime, then Welch was not a trespasser, but was justified in arresting the defendant, as the jury have found, upon sufficient evidence that the pursuit of the defendant was immediate. The defendant's claim is, that his act did not constitute a crime, because his attempt or threat to shoot Decker was dependent upon his refusal to obey the defendant's illegal direction to stop and go back, and he relied upon the case of the *People v. Johnson* (9 W. Dig. 384) to sustain that claim.

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In that case the complainant went to defendant's room and entered into an altercation with her, whereupon the defendant took a revolver from her pocket, cocked it, and, pointing it at her, said, "If you come near to me I will shoot you." That was the people's entire case.

The court held that, admitting that it must be inferred that the pistol was charged from the threat to shoot, the proof did not establish an assault. That case is unlike this. In that case the defendant was in her own room and had an undoubted right to prevent the complainant from approaching her. There no threat was uttered, no violence intended, except upon the contingency that the complainant should violate that right. In the case at bar Decker was passing along a public street on his way home, and had a right to do so unmolested by the defendant. The defendant was a wrongdoer in interfering with him and requiring him to stop and go back. The contingency in the Johnson case was legal, and one the defendant had a right to insist upon and enforce; while in this, the contingency was illegal and one that the defendant had neither right to demand nor enforce. If the defendant's position is correct, he might, with equal justice, enter the house of another, and, by similar acts, require him to leave his home and family, and still be innocent of an assault. We do not think such is the law.

In *State v. Horne* (92 N. C. 805), it was held that where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposes to do and might lawfully do, by a display of physical force, and by brandishing a deadly weapon with violent threats of using it, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person desists, an assault is consummated.

In *Reg. v. St. George* (9 Car. & P. 483), it was said, "If a person presents a pistol purporting to be a loaded pistol at another, and so near as to have been dangerous to life if

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the pistol had gone off, semble that this is an assault, even though the pistol were in fact not loaded."

In *State v. Cherry* (11 Ired. 475), the defendant standing within a few feet of the complainant, presented a pistol at him, saying, "If you don't turn the negro loose I will shoot you," and it was held that it constituted an assault.

In delivering the opinion in that case the court said: "When a man presents a pistol at another, threatening to shoot, he puts him in fear, and gives him a legal excuse for a battery, and it may be questioned whether the act can be excused, by proving that the pistol was not loaded, without also proving that the other person knew that fact. In this case there was no proof that the pistol was not loaded, and the question is, was the state bound to prove that it was loaded? The fact that it was not loaded is a matter of excuse, and must be proved by the defendant. The fact was within his knowledge, and as by his act (actions, it is said, speak louder than words), he represented the pistol to be loaded, he has no right to complain, that such is *prima facie* taken to be the fact, unless he proves to the contrary."

In *Commonwealth v. White* (110 Mass. 407), it is said, if A. menacingly points at B. a gun, which B. has reasonable cause to believe loaded, and B. is put in fear of immediate bodily injury therefrom, and the circumstances would ordinarily induce such fear in a reasonable man, A. is guilty of an assault, although he, A., knows that the gun is not loaded. In *Crow v. The State* (41 Texas, 468), it was held that pointing a gun at a person is an assault unless it appeared that the gun was unloaded, and the burden of proof that it is unloaded is on the defendant. In *The State v. Shepard* (10 Iowa, 126), it was held, the pointing of a gun, which is not loaded, in a threatening manner, at another, constitutes an assault when the party at whom it is pointed does not know that it is not loaded, or has no reason to believe that it is not. See also *Anonymous*, 1 Vent. 256 ;

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Genner v. Sparks, 6 Mod. 173, 174; Fairme's Case, 5 City Hall Rec. 95; People v. Lee, 1 Wheeler's Cases, 364; People v. Bransby, 32 N. Y. 525.

The principle of the case cited, when applied to the case at bar, justifies the conclusion that the defendant's threat to shoot Decker if he did not stop and turn back, accompanied by the act of cocking his gun and pointing it at him, constituted an assault.

We are of the opinion not only that the evidence was sufficient to sustain the verdict, but that it was sufficient to justify the judge in charging that an assault was committed upon Decker by the defendant in the presence of Welch, and that he had a right to arrest him, if he proceeded properly.

Nor do we think the court erred in declining to charge "that if the gun was not loaded at the time he pointed it at Decker no crime was committed, and the defendant must be acquitted."

There were no errors in the rejection or admission of evidence which would justify a reversal of the judgment herein, or which require special examination.

These considerations lead to the conclusion that there were no errors committed upon the trial which affected the substantial rights of the defendant, and that the judgment and order appealed from should be affirmed.

Judgment and order affirmed; and the clerk directed to enter judgment, and remit a certified copy, with the return and decision of this court to the court of sessions of Chemung county, pursuant to sections 547 and 548 of the Code of Criminal Procedure.

HARDIN, P. J., and MERWIN, J., concur.

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MARIA E. WOODMAN, Respondent, v. THOMAS D. PENFIELD, Sheriff, Appellant.

Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Appeal. Referee.*—The refusal of a referee to respond to a request to find is not a ground for reversal, unless such refusal is prejudicial to the appellant. In view of an adverse finding upon the only question involved in the case, the referee's refusal to find requests, though sustained by the evidence, is harmless.
2. *Evidence. Memoranda.*—The admission in evidence of an inventory, made by the witness at the time of the transaction, on proof that it was then correct, is proper.
3. *Same. Intent.*—In an action for conversion against a sheriff for a levy and sale of property claimed by plaintiff on an execution against her husband, they may testify that, in the sale and transfer by him to her, they had no intent to hinder, delay or defraud creditors.
4. *Husband and wife.*—A transfer of personal property from husband to wife is valid, when made in good faith and based upon a sufficient consideration.

See note at end of case.

Appeal from a judgment entered upon the report of a referee.

J. S. Baker, for appellant.

H. S. Bedell, for respondent.

MARTIN, J.—This action was for the conversion of a quantity of cigars to which the plaintiff claimed title. The defendant sold them under and by virtue of two executions issued upon judgments against the plaintiff's husband. The defendant sought to justify such sale on the ground that the property in question was transferred by the plaintiff's husband to her with an intent to defraud his creditors, and that such transfer was therefore void as to

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them. The only question litigated on the trial, except the value of the property sold, was the validity of the plaintiff's title.

The referee found that the plaintiff was the sole owner and entitled to the possession of the property ; that it was unlawfully taken by the defendant and converted to his own use ; that it was of the value of \$969.35 ; and he awarded the plaintiff judgment for that sum, together with interest and costs. The referee expressly declined to find that the transfer to the plaintiff was voluntary or without consideration, or that it was made with an intent to hinder, delay or defraud the creditors of her husband.

The conclusions of the referee as to the facts, as indicated both by his findings and his refusals to find, seem to be fairly justified by the evidence. The question whether such transfer was fraudulent as to the creditors of the plaintiff's husband was a question of fact, and as the findings of the referee were sustained by the evidence, we do not think his findings should be disturbed.

But the defendant contends that the referee erred in refusing several of his requests to find, which he claims were sustained by the evidence. If we were to assume that some of the requests proffered were sustained by the evidence and not found, still, as the referee has properly found adversely to the defendant upon the only question involved in the case, it can hardly be said that his refusal to find those requests was harmful to the defendant. Such findings would not have changed the result, and would have in no way aided the defendant, so long as it was properly found that the plaintiff was the owner of the property, and there was an express refusal to find that the conveyance was fraudulent or made with a fraudulent intent or purpose.

While exceptions to alleged findings of fact when they are unsupported by evidence, and to requests to find when they are established by undisputed proof, present questions of law, and are reviewable on appeal (*Bedlow v. N. Y. Float-*

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ing Dry Dock Co., 19 N. E. Rep. 800-802; *Bullock v. Bemis*, 20 N. Y. State Rep. 836), still, the refusal of a referee to respond to a request to find is not a ground for reversal, unless such refusal was prejudicial to the appellant. *Matter of Hicks*, 14 N. Y. State Rep. 320. We think the referee committed no error in refusing to find as requested by the defendant, which would justify an interference with the plaintiffs' judgment.

The defendant also contends that the referee erred in permitting the witness Swartfiguer to testify that an inventory made by him, when the property in question was transferred, was correct and in admitting it in evidence under defendant's objection and exception.

In *Howard v. McDonough* (77 N. Y. 592), which was an action for the conversion of a stock of goods consisting of many items, where a witness had made a memorandum of the items and their value, and he was permitted to use the memorandum in testifying, and it was received in evidence, it was held that the court might, in its discretion, require the witness to testify to each item separately, or it might allow the witness to testify quite generally to the items and their values, and receive the memoranda as the detailed result of his examination, leaving the adverse party to a more minute cross-examination. See *McCormick v. Pa. Cent. R. R. Co.*, 49 N. Y. 304-316. We think the principle of these cases sustains the rulings complained of.

A further claim made by the defendant is, that the court erred in admitting in evidence the bill of sale made by the plaintiff's husband to her. This claim is based upon the theory that a contract between a husband and wife is void. This claim cannot be sustained. It must, we think, be regarded as settled in this state that such a transfer is valid and will be upheld when made in good faith and founded upon a sufficient consideration. *Woodworth v. Sweet*, 51 N. Y. 8; *Benedict v. Driggs*, 34 Hun, 94, and cases cited in opinion.

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The referee committed no error in permitting the plaintiff and her husband to testify that they had no intent to hinder, delay or defraud his creditors when the sale and transfer to the plaintiff was made. *Seymour v. Wilson*, 14 N. Y. 567; *Cortland County v. Herkimer County*, 44 N. Y. 22.

We have examined the other questions presented by the defendant's brief, and find none that disclose error in the trial, or that seem to require special consideration.

Judgment affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concur.

NOTE ON CAPACITY OF HUSBAND AND WIFE TO CONTRACT WITH, AND TO SUE, EACH OTHER.

The recent legislation in regard to rights of married women has undoubtedly enlarged her power to contract with persons other than her husband, and has conferred upon her the right to contract in the same form as though unmarried. But her capacity to enter into a contract with her husband, or her husband with her, has not been affected by the act of 1884.

Chap. 381, Laws of 1884, provides as follows:

"§ 1. A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary.

"§ 2. This act shall not affect nor apply to any contract that shall be made between husband and wife.

"§ 3. This act shall take effect immediately."

The common law, the former "Married Woman's Acts" and the construction given to them by the courts, determine the capacity and disability still existing in contracting with, and enforcing their rights, against each other. The principles of law relative to, and authorities of this State on, this subject, are herein discussed.

Conveyances of real estate.—Before the Married Woman's Acts of 1848, the husband acquired at law in the wife's freehold interest in lands for life, a freehold interest in himself during their joint lives. And so it was if lands were conveyed to her during coverture. And the legislature could not take away this vested right. *Westervelt v. Gregg*, 12 N. Y. 202; *Wood v. Wood*, 83 N. Y. 575. But in equity there was recognition of the capacity in a married woman to enjoy property separate

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from her husband; and that too where she came by it during coverture. The language of a deed which recites, "only as and for her own separate estate, free from the control of her husband," was sufficient to create a separate estate in her, as any language would effect that end, where, from the nature of the transaction, or from the whole context of the instrument, that intent appears; nor need there have been a trustee named in the instrument. The law would create the husband a trustee for the wife in such case. *Wood v. Wood, ante*. Thus it stood with her lands, and the rights of husband and wife in them, when the Married Woman's Acts were passed. The effect of these acts was to give to a married woman, over all the property that she owned, the same control and power of management that she would have had in case she had been sole, with certain exceptions as to the manner of binding it for a debt, until the act of 1884 was passed.

Those statutes by their own operation changed her capacity to hold a separate estate as a matter of equity, into a legal estate, and she thereby became entitled to control and manage it, as though she was a *femme sole*. By those statutes she was given the power to sue and be sued, and could bring an action to recover the possession of premises, if she had been unlawfully ousted; *Wood v. Wood, ante*; *Darby v. Callaghan*, 16 N. Y. 71; and if her husband was the person who had thus ousted her, she could sue him. *Wood v. Wood, ante*; *Wright v. Wright*, 54 N. Y. 437.

Owing to the unity between husband and wife, the husband could not at common law convey directly to her. *Diefendorf v. Diefendorf*, 56 Hun, 639. But this principle is changed by chapter 537, Laws of 1887. *Id.* A deed from husband to wife would always be sustained in equity. *Hunt v. Johnson*, 44 N. Y. 27; *Townshend v. Townshend*, 1 Abb. N. C. 81; *Jones v. Clifton*, 101 U. S. 225; *Diefendorf v. Diefendorf, ante*.

In the latter case, plaintiff's husband, shortly prior to his death, executed and acknowledged a deed of real estate to her, and delivered it to a third person, with a direction to retain it for her until after his death, and then put it on record. The deed recited that it was in consideration of \$300, money which plaintiff had paid to him, and stated that she was to expend three hundred dollars in the purchase of a cemetery lot, which she accordingly did. Plaintiff held notes of her husband. His brothers and sisters claimed title by descent to the real estate. In an action brought by her against them, it was held that she was the absolute owner of the property.

It was an established doctrine of the common law, that, in consequence of the unity of person between husband and wife, neither the husband nor the wife could grant, the one to the other, an estate in possession, reversion or remainder, to take effect in possession during the lifetime

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of the grantor. *White v. Wager*, 25 N. Y. 328; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Voorhees v. the Presbyterian Church of Amsterdam*, 17 Barb. 103; *Simmons v. McElwain*, 26 Id. 419; *Dempsey v. Tylee*, 3 Duer, 73; *Hunt v. Johnson*, *ante*. The rule itself was one of those stubborn mandates of the common law which requires absolute obedience from the courts, whatever they may think of the justice or equity of its application in a particular case. But it was, nevertheless, a very technical principle; and, where the design was for a husband to convey to the wife, it might be evaded in various ways, as by a feoffment to a third person to the use of the wife; or, a covenant with a third party to stand seized to the use of the wife; or, where the wife desired to convey to the husband the two could join in a conveyance to any one whom they could trust to convey immediately to the husband; and thus the title would be vested in him. *White v. Wager*, *ante*; *Merriam v. Harsen*, 2 Barb. Ch. 232.

At common law, she could not convey to any one except by the expensive and dilatory process of fine and recovery; but afterwards, by statute, she was enabled to execute a valid deed of her lands by joining with her husband, and submitting to an examination to show that she acted without coercion; but she could not devise the lands. *Id*.

As to her capacity to acquire the title to property to her own use, the rule was, that all the personal estate which she possessed at her marriage, and all which came to her by any title during coverture, even when received as a compensation for her personal services, vested immediately in her husband, unless it was protected by a settlement to her sole and separate use. If she was the owner of land at the time of her marriage, or acquired title to it during coverture, the husband immediately became entitled to the rents and profits of it and was at once seized of a freehold estate in it. But none of these disabilities attached to the condition of a married man, who was as free to receive the title to property, and to dispose of it, after marriage as before, with the single exception that he could not be the grantee of a deed executed by his wife, or make a grant directly to her. But as to the world in general, the state of marriage did not affect his ability to acquire title to, or to dispose of, his property, just as he might have done if he had not been married; with the single exception of dower, the inchoate right to which he could not dispose of. *Id*.

The act of 1848 constituted the wife the sole proprietor of all the property of both kinds which she should own when she came to be married, and of all which should devolve upon her by any title during her coverture. It attempted to divest the rights already vested in her husband under the antecedent law, but as to this it was ineffectual. See *Westervelt v. Greig*, *ante*; *White v. Wager*, *ante*.

But it did not confer upon her the capacity to convey or devise real

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estate. See *Wadhams v. American Home Miss. Soc.*, 12 N. Y. 415. This power was given by the act of 1849, which authorized a married woman to convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as though she was unmarried. The design was not to confer any additional advantages upon married men, but its intention was solely to benefit the other party to the marriage relation.

It does not enable a husband to take a title to realty directly from his wife, contrary to the rule of the common law. *Id.*

The power in terms given to a married woman, by the act of 1849, to convey and devise real and personal property, as though she was unmarried, does not necessarily include any conveyance which she might make to her husband. There was, no doubt, an intention to confer upon the wife the legal capacity of a *femme sole*, in respect to conveyances of her property, but this does not prove that she can convey to her husband, for no such question could possibly arise in respect to a *femme sole*, inasmuch as there was no person to whom, in respect to conveyances made by her, the rule of the common law could apply.

It is not the disability of the wife alone which would, by the common law, render void her conveyance to her husband; the husband was as much disabled to take under such conveyance as she was to convey. To render a conveyance valid, therefore, the husband's disability, as well as that of the wife, must be removed; but there is no language in these acts, and nothing in their apparent intention, which looks to the removal of any disabilities under which he labored. It was held in *White v. Wager*, *ante*, that a deed executed by a wife, in contemplation of death, to her husband, in good faith and voluntarily, was wholly ineffectual and void.

In *Winans v. Peebles*, 32 N. Y. 423, it was held that the disability of the husband to take land by conveyance from the wife remains as before the statute of 1849, and that a voluntary conveyance of land by the wife to the husband is wholly ineffectual. But it was also held in this case that the validity of the deed from the wife to the husband may be established by the application of principles of equity, where a consideration has been paid, and also where the grantee is entitled to equitable relief for improvements made upon the premises in good faith, to the extent of such equitable claim.

A conveyance of real estate by deed from a husband to his wife intended as a gift *in presenti*, though void at law may be sustained and enforced in equity. *Hunt v. Johnson*, *ante*. In the case of *Shepard v. Shepard*, *ante*, the consideration of the deed was natural affection, and to make a sure maintenance for the wife, in case she should survive her husband. And it was held that the consideration was very

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meritorious and that the deed from the husband to the wife may, and ought in this case to, be aided and enforced by the court of chancery.

The same doctrine is laid down in *Newfolk v. Thomson*, 3 Edw. Ch. 92. In *Garlick v. Strong*, 3 Paige, 440, a post-nuptial contract between the husband and wife, by which a bond and mortgage were set apart for the use of the wife, was sustained. To the same effect is *Bullard v. Briggs*, 7 Pick. 533.

In *White v. Wager*, *ante*, the question of the equitable interposition of the court did not and could not arise. The action was to recover damages for breach of warranty of title. The plaintiff alleged that no title to the land was transferred to him, because no title was in his grantor, and that no title was in his grantor because the latter obtained his title by a conveyance to his wife; and that by the rules of law, a wife could not convey to her husband a title to take effect in possession during her life. The defendant did not attempt apparently to sustain his title by an appeal to the equitable powers of the court. This power could be invoked only in a case where the question should arise between the husband or those claiming under him, and those who, except for the deed, would have had the title as heirs of the wife. A disposition of it between the husband and a stranger could not have affected the rights of the wife's heirs. The case of *White v. Wager* was well decided upon its facts, and that without trenching upon the well settled powers of the court to afford equitable relief in a proper case, and when presented by the parties entitled to ask it.

In *Winans v. Peebles*, *ante*, the proper parties were before the court. It was an action by the children of the wife by a former marriage to set aside a conveyance made by her to her husband. The title of the wife was by a deed from a third person, and the consideration for it was paid by her father. The conveyance was made by her directly to her husband, and upon the request of her father made at the time the property was given to her, and her verbal promise to convey to her husband after her father's death. The court below sustained the conveyance upon principles of equity. The court of appeals reversed this judgment, holding the law to have established to the contrary in *White v. Wager*, *ante*, and saying that the deed from a married woman to her husband was void, and that being wholly without consideration, the court of equity would not interfere to sustain it. But it does not appear whether the deed was expressed to be in consideration of love and affection, or whether that was actually the moving consideration. It is simply stated that no consideration was paid by the husband or received by the wife.

That case differs from the case of *Hunt v. Johnson*, *ante*, in this, that it was conveyance by the wife to the husband; while in the latter case the conveyance was by the husband to the wife. At law either convey-

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ance is equally void, but they do not necessarily stand upon the same basis in equity. It is the duty of the husband to provide an assured and comfortable support for his wife during his life and after his death, but no duty rests upon the wife to provide for the husband. An application of the husband's property for her comfort is eminently equitable, and has been favored by the courts from their earliest existence. There is in the nature of things a broad and palpable distinction against an equitable claim in the husband's favor, and in favor of such claim for the wife. And it was upon this distinction that the case of *Hunt v. Johnson*, *ante*, was decided.

In equity, a deed by a wife directed to her husband, may be treated as valid. *Townshend v. Townshend*, 1 Abb. N. C. 81.

The case of *White v. Wager*, *ante*, was a suit at law for the recovery of money, in which it was held that a deed executed by a wife in contemplation of death, to her husband, was wholly ineffectual. But there are other cases, which hold, in substance, that such a conveyance, made for a good consideration, may be sustained and enforced in equity, *Townshend v. Townshend*, *ante*; *Hunt v. Johnson*, 44 N. Y. 27.

Although in this latter case the deed was from the husband to the wife, still the principle upon which the case rests, and its reasoning would in equity uphold a conveyance, upon a good consideration from the wife to the husband.

A deed of land in 1853 directly from the husband to his wife, though void at law, was not necessarily so in equity. *Mason v. Libby*, 19 Hun, 119; *Hunt v. Johnson*, *ante*; *Peck v. Brown*, 2 Robt. 119; *Townshend v. Townshend*, *ante*; *Simons v. McElwain*, *ante*; *Shepard v. Shepard*, *ante*. Courts of equity will uphold grants from husband to wife, when they would be void at law. Equity will not, however, uphold grants of all his estate to his wife by which he will be denuded. The circumstances of the husband will be considered where creditors are concerned. *Mason v. Libbey* *ante*.

Prior to the enactment of chapter 537 of the Laws of 1887, a deed directly between husband and wife was wholly ineffectual by law; and such is the case even though the conveyance was made in 1886. *Fruhauf v. Bendheim*, 53 Hun, 636. But a contract for the purchase and sale of land is not a deed. *Id.* Although under such a contract, it has frequently been said that the land becomes real estate in the purchasers, yet even then the vendor retains the legal title as their trustee. *Id.*; *Thomson v. Smith*, 53 N. Y. 301. The assignment of a contract of this kind is not equivalent to a conveyance of the property to which it relates, for the legal title to such property remains in trust in the vendor. *Id.* If such an assignment was equivalent to a deed, the wife of the original vendee would have to join in the assignment, in order to cut

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off her dower, in case he should desire to transfer his interest in the contract to a third party. *Id.*

Chap. 537, Laws of 1887, provides as follows:

"§ 1. Any transfer or conveyance of real estate hereafter made by a married man directly to his wife, and every transfer or conveyance of real estate hereafter made directly by a married woman to her husband, shall not be invalid because such transfer or conveyance was made directly from one to the other without the intervention of a third person.

"§ 2. This act shall take effect immediately."

This section simply permits them to convey directly to each other where they could do so previously through a third party, but does not enlarge their capacity to contract with each concerning real estate.

In *Ellis v. Myers*, 54 Hun, 638, a few days prior to making an assignment, one of the assignors made and delivered a deed of real estate to his wife. The facts were these: On a settlement of the estates of her father and uncle in 1844 and 1864, she received toward her share of the estate, notes given to them by her husband for loans. She surrendered the notes to her husband, and he promised to pay her when he could, and the deed was given in payment therefor. And it was held that such indebtedness formed a good consideration for the deed.

Although the marriage between them took place prior to the act of 1848, his promise to her made to reimburse her the money which he borrowed from her, furnishes the foundation in equity for upholding a conveyance made for that purpose. The husband has a right to decline to assert absolutely his marital rights to the personal property of his wife, and to borrow the money of her with the understanding and agreement that it should be repaid. *Id.* Though she could not have enforced her claim for loaned money by reason of the statute of limitations, a creditor is not in a situation to insist upon the statute against such indebtedness. This defense is personal to the debtor and manifestly was waived, when the settlement and payment of the indebtedness took place by means of the conveyance. *Id.*; *Jacox v. Caldwell*, 51 N. Y. 395.

In *Brooklyn Bank v. Lamon*, 56 Hun, 647, the defendants were married in 1843 or 1844. The wife at the time of her marriage had one thousand pounds sterling in her own right. This money was advanced to her husband, and by him used in the support of the family, under an agreement that he would repay her with interest. Subsequently he repaid her considerable sums on account of the loan, which were deposited by her in savings banks. This money was withdrawn by her and again loaned to him under a similar agreement. He, in 1886, conveyed certain land to her in payment of the said loans. No question of inadequacy of consideration arises other than is implied from the fact that the consideration, being the repayment of these loans, was insufficient in law. This claim was made on the ground that the parties were married before the Married Women's acts were passed, and

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for this reason the money belonged in law to the husband. And it was held that the deed was supported by a good consideration though given in repayment of moneys received by the husband from the wife under an agreement that he would repay her with interest, even though they were married before 1848. This point was so decided in the case of *Syracuse Plow Co. v. Wing*, 85 N. Y. 421.

In that case the money was loaned by the wife to her husband on a promise to repay the same, and the court said: "If the money was received by the husband as his wife's, and to be accounted for by him to her he waiving his marital rights thereto, she had an equitable right thereto sufficient to sustain the mortgage which he subsequently gave to secure it, and the mere lapse of time would not invalidate the security." The marriage in this case was entered into before the passage of the Married Women's Act. *Brooklyn Bank v. Lamon*, *ante*; *Woodworth v. Sweet*, 51 N. Y. 9; *Jacox v. Caldwell*, Id. 395; *Babcock v. Eckler*, 24 Id. 623; *McCartney v. Welch*, 51 Id. 626.

In *The Syracuse Chilled Plow Company v. Wing*, *ante*, the defendant in 1844 received from the estate of his wife's father the sum of \$1,366, to which he was entitled. This sum he applied toward the purchase of a farm and took the title in his own name. From time to time before any liability to plaintiff was incurred, the money was spoken of, between him and his wife, as her money, and he promised to execute to her a paper to show for it, but no such paper was executed until 1878 when he executed to a third person his bond, secured by a mortgage upon his farm, for said sum, and interest, with the understanding that said security should be assigned to the wife, which was done. The wife purchased a prior mortgage upon the farm with other moneys received by her in her own right after 1848. In 1878, the husband conveyed the farm, through a third person, to his wife, subject also to a third mortgage thereon, in payment of the two mortgages so held by her. The plaintiff, as a judgment creditor of the husband, brought an action to set aside such conveyance to the wife as fraudulent and void as to creditors; and it was held in such action that, although the money was received by the husband prior to the passage of the Married Women's Act of 1848, yet, if received by him as his wife's, to be accounted for or secured by him, he could waive his marital rights thereto, and the wife has an equitable right to the fund sufficient to sustain the mortgage given to her, and the mere lapse of time would not invalidate the security.

Conveyances to husband and wife.—The common law rule that, when land is conveyed to husband and wife, they do not take as tenants in common, or as joint tenants, but each becomes seized of the entirety, *per tout* and not *per my*, and that on the death of either the whole survives to the other, was held to be still subsisting in this state, notwith-

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standing the acts in relation to married women. *Zornlein v. Bram*, 100 N. Y. 12.

The act of 1880, which allows husband and wife to make division between themselves of land thus held, does not abrogate the former rule. At all events it cannot affect the title where the conveyance to husband and wife was made prior to the passage of said act. The seizin of the entirety to each, and the right of survivorship, could not be divested by a subsequent statute, as those rights vested by virtue of the grant and not of mere succession. The act of 1880 could not so operate as to authorize either the husband or wife in such case separately to convey to a third party. *Id.*

By reason of the unity of husband and wife, in the view of the law an obligation taken in the name of both inures to the benefit of both, and the whole goes to the survivor. *Platt v. Grubb*, 41 Hun, 447. This old rule of law is still prevalent in this state. *Id.*; *Bertles v. Nunan*, 92 N. Y. 151.

Chapter 472 of the Laws of 1880, seems to recognize the right of husband and wife to hold lands as tenants in common, joint tenants or tenants by entireties. Under the statutes, the right of a married woman, to take and hold personal property, is as broad and absolute as her right to take and hold real estate. *Kaufman v. Schoeffel*, 46 Hun, 571. And the husband and wife may take and hold personal property in common.

Chap. 472, Laws of 1880, provides as follows:

"Section 1. Whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves, and such partition or division, duly executed under their hands and seals, shall be valid and effectual; and when so expressed in the instrument of partition or division, such instrument shall bar the right of dower of the wife in and to the lands and tenements partitioned or divided to the husband.

"§ 2. This act shall take effect immediately."

By the common law, when land was conveyed to husband and wife, they did not take as tenants in common or as joint tenants, but each became seized of the entirety *per tout et non per my*, and upon the death of either the whole survived to the other. *Bertles v. Nunan*, *ante*; 12 Abb. N. C. 283. The survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee. During their joint lives, the husband could, for his own benefit, use, possess and control the land and take all the profits thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the right of his wife in case she survived him. *Id.*

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This rule as to the effect of a conveyance continued in force, notwithstanding the Revised Statutes which provided that "every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy." *Id.* *Dias v. Glover*, 1 Hoff. Ch. 71; *Torrey v. Torrey*, 14 N. Y. 430; *Wright v. Saddler*, 20 *Id.* 320. In the latter case, the court said: "It appears to be well settled that this statute does not apply to the conveyance of an estate to husband and wife. They are regarded in law as one person."

It is not the effect of section three of chapter 200 of the Laws of 1848, as amended by chapter 375 of the Laws of 1849, and was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her; and, whatever the effect of a conveyance to a husband and wife was, prior to this statute, so it remains. If the operation of such a conveyance was to convey the entire estate to each of the grantees, so that each became seized of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed so as to make the grantees tenants in common. This section gives the wife no greater right to receive conveyances than she had at common law; but its sole purpose was to secure to her during coverture, what she did not have at common law, viz.: the use, benefit and control of her own real estate, and the right to convey and devise it as though she was unmarried. *Bertles v. Nunan, ante.*

The provisions in the acts of 1860 and 1862 have doubtless reference only to the separate property of a wife which she owns apart from her husband, and have no reference whatever to land conveyed to husband and wife, in which by the common law each became seized of the entirety. *Bertles v. Nunan, ante.* They do not limit or define what estate the husband and wife shall take in the lands conveyed to them jointly. Their utmost effect is to enable the wife to control and convey whatever estate she gets by any conveyance made to her solely, or to her jointly with others than her husband. *Id.*

The course of legislation renders it very evident that the legislature did not understand that the common law rule as to the unity of husband and wife had been abrogated by the acts of 1848, 1849 and 1860, and that, whenever it intended an invasion of this rule, it made it by express enactment. But still more significant is the act of 1880, which provides that, "whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants or as tenants by entireties, they may make partition or division of the same between themselves," by deed duly executed under their hands and seals. The disability of husband and wife growing out of their unity of person, to convey to each other, is here recognized, as is also the estate by entireties created by a deed to them jointly. *Id.*

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The ability of the wife to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute. Although § 7 of the act of 1860 authorizes a married woman to maintain an action against any person for an injury to her person or character, yet the court of appeals has held that she cannot maintain an action against her husband for such an injury. *Shultz v. Shultz*, 89 N. Y. 644. And so it was held, notwithstanding the acts of 1848, 1849 and 1860, that the common law disability of husband and wife, growing out of their unity of person, to convey to each other, still existed. *White v. Wager, ante*; *Winans v. Peebles, ante*; *Meeker v. Wright*, 76 Id. 262; 7 Abb. N. C. 299; reversing 11 Hun, 533. It is believed also that the common law rule as to the liability of the husband for the torts and crimes of his wife are still substantially in force. *Bertles v. Nunan, ante*.

There is no reason for holding that the common law rule as to the effect of a conveyance to husband and wife has been abrogated.

In *Goetet v. Gori*, 31 Barb. 314, it was held that a lease for a term of years executed to husband and wife, was unaffected by the acts of 1848, 1849, and that husband and wife by conveyances to them still took as tenants by the entirety.

In *F. & M. Nat. Bank v. Gregory*, 49 Id. 155, it was held that these statutes had no relation to or effect upon real estate conveyed to husband and wife jointly, and that, in the case of such conveyance, notwithstanding those statutes, they take as tenants by the entirety.

In *Miller v. Miller*, 9 Abb. N. S. 444, it was held that the common law rule was applicable to a conveyance made to husband and wife in 1867.

In *Freeman v. Barber*, 3 N. Y. S. C. 574, the same rule was applied in 1874 by the supreme court. It was held that the law was settled in this state that, in the case of a conveyance to husband and wife, they take, not as joint tenants or as tenants in common, but as tenants by entirety, notwithstanding the statute then enacted.

In *Beach v. Hollister*, 3 Hun, 519, decided in 1875, the court said: "These statutes operate only upon property which is exclusively the wife's, and were not intended to destroy the legal unity of husband and wife, or to change the rule of the common law governing the effects of conveyances to them jointly."

In *Ward v. Krumm*, 54 How. 95, decided in 1876, it was held that, under a deed executed to husband and wife in 1872, both became seized of the entirety, though the wife paid the entire consideration of the conveyance.

In *Meeker v. Wright, ante*, the judge writing the opinion reached the conclusion, that the common law rule governing conveyances to husband and wife had been abrogated by the modern legislation in this state. But this portion of the opinion was not concurred in by a majority of the judges.

In *Feely v. Buckley*, 28 Hun, 451, it was held by a divided court, upon

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the authority of the last cited case, that tenancy by the entirety is abrogated by the Married Women's Acts; and upon the same authority a similar rule was laid down in *Zornlein v. Bram*, decided in the superior court of New York, by a divided court, and reported in 16 W. Dig. 458.

But it was decided in *Forsyth v. McCall*, in the fourth department in June 1880, and in *Meeker v. Wright*, after a new trial in the third department, that the common law rule was not abrogated. 27 Alb. L. J. 199.

Similar legislation to that which exists in this state, as to the rights and property of married women, exists in many of the states of the union, and the decisions are nearly uniform in all the other states where the question has arisen, that a conveyance to husband and wife has the common law effect, notwithstanding such legislation. See *Bates v. Seeley*, 46 Pa. St. 248; *French v. Mehan*, 56 Id. 286; *Diver v. Diver*, Id. 106; *Fisher v. Brown*, 25 Mich. 350; *McDuff v. Beauchamp*, 50 Miss. 351; *Washburn v. Burns*, 34 N. J. L. 18; *Chandler v. Cheney*, 37 Ind. 391; *Marburgh v. Cole*, 49 Md. 402; *Bennett v. Childs*, 19 Wis. 362; *Robinson v. Eagle*, 29 Ark. 202.

It is impossible now to determine how the rule in the remote past obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. *Bertles v. Nunan*, *ante*.

There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist, or is not discernible, but the courts, on that account, are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate. *Id.* If the rule is to be changed it should be changed by a plain act of the legislature, applicable to future conveyances; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common law rule. *Id.*

In *Meeker v. Wright*, *ante*, it was held that, where a husband conveyed directly to his wife his interest in land held by them in entirety, and also personal property, and the wife gave him a bond and mortgage for the purchase price thereof, such bond and mortgage were valid.

Release of dower.—A release by a wife of her inchoate right of dower, by joining with her husband in a conveyance of his lands, is a good consideration for his promise to set apart a portion of the purchase money to her separate use, and equity will compel the husband to perform the agreement; *Doty v. Baker*, 11 Hun, 222; *Garlick v. Strong*, *ante*; *Foster v. Foster*, 5 Hun, 557; and where a promissory note was given by the husband to the wife in consideration of her release of her inchoate right of dower by joining with him in a deed, it was held valid. *Brooks v. Weaver*, 3 Alb. L. J. 283.

But although a release by a wife of her inchoate right of dower in the

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lands of her husband is a good consideration for his payment, or his promise to pay, to her, a part of the purchase money, yet, as against the creditors of the husband, whose debts existed at the time, in case he is insolvent, she will not be permitted to take or retain more than the value of the consideration. *Doty v. Baker, ante*; *Shepard v. Shepard, ante*; *Garlick v. Strong, ante*; *Wickes v. Clarke, 8 Paige, 161.*

In *Smart v. Haring, 14 Hun, 276*, it was held that, a release by a wife of her inchoate right of dower in the lands of her husband is a good consideration for his paying or promising to pay her therefor; and a conveyance of property to her in pursuance of such agreement is valid, except as against creditors existing at the time thereof, and is valid as to them to the extent of the value of such inchoate right, computed according to the rule laid down in *Jackson v. Edwards, 7 Paige, 408.*

In *Kelly v. Case, 18 Hun, 472*, an action was brought upon a promissory note for \$3,000 made by one Kelly to the order of his wife. It was given to induce her to release her inchoate right of dower in a house and lot sold by him for \$2,500. Her right was of the value of \$390.92. Payments to the amount of about \$1,400 had been made upon it before the commencement of the action. It was held that the note was only valid to the amount of the value of her inchoate right of dower, and that, as the payments made exceeded that amount, the action could not be maintained. It was further held that the wife's inchoate right of dower is not included in the kinds of property specified in § 1 of chapter 90, Laws of 1860, nor is it within the provisions of § 7 of that act, as amended by chapter 172, Laws of 1862.

Post-nuptial agreements between husband and wife, though void in law, will be sustained and enforced in equity to the extent of the actual consideration thereof. *Foster v. Foster, ante*; *Shepard v. Shepard, ante.*

Accordingly, where the husband, in order to induce his wife to relinquish her right of dower in certain real estate which he wished to sell, agreed to give her \$70 a year during his life, it was held that the release by his wife, of her inchoate right of dower was a valuable and sufficient consideration for the promise. *Garlick v. Strong, ante*; *Simar v. Canaday, 53 N. Y. 298*, and that the husband should be compelled to perform the agreement on his part.

As to personal property.—In *Jewett v. Noteware, 17 W. Dig. 438*, an action was brought by a receiver in supplementary proceedings to set aside a mortgage given by a husband to his wife as in fraud of creditors. When the mortgagor married the mortgagee, she had a separate estate of \$1,100. Soon after the marriage, she let her husband have this amount upon an agreement that he would give her security therefor whenever she wished it. Eighteen years afterwards he gave her the mortgage in question to secure the loan and interest. This was done while a suit was pending against him, the result of which he feared, and which was soon after decided against him. His intent in giving the mortgage was to secure his wife in any event. And it was held that, whatever was the intent of the wife, her

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act in taking security for the exact amount of a *bona fide* debt cannot be fraudulent as against other creditors; and that the judgment creditor could not successfully attack the mortgage.

In *Tallinger v. Mandeville*, 113 N. Y. 427, in pursuance of an antenuptial agreement, the defendant's testator executed to plaintiff, who was his wife, an instrument, by which he agreed to pay to her \$10,000 at his death, provided she lived with him as his wife up to that time and faithfully performed the duties of that relationship. But subsequently the parties executed another instrument by which plaintiff, in consideration of \$5,000 then paid to her by her husband, released and cancelled the former agreement. In an action upon the original agreement it was held that, while the latter one, so long as it remained executory, could not have been enforced, yet having been executed, in the absence of any allegation of fraud, plaintiff was not entitled to be relieved therefrom; and that having released her husband's obligation under the former agreement, she could be reinstated in her rights under it only by a suit in equity instituted for that purpose.

There has never been a time in the history of the law, and certainly not since 1848, when such an agreement between husband and wife relating to her separate estate, and fully executed, would have been absolutely void. In this case, the wife surrendered an obligation which she then held as part of her separate estate, and in lieu thereof received \$5,000 in money, and this thereupon became her separate estate.

It never can be held in a forum, administering both law and equity that she can hold the money thus received and enforce the obligation which she has surrendered in consideration thereof. *Id.* Agreements between husband and wife, founded upon valuable considerations, have frequently been enforced in equity. She may even sell her separate estate to her husband for a valuable consideration, and the sale will, in equity, be held. *Id.*; *White v. Wager, ante*; *Winans v. Peebles, ante*; *Hunt v. Johnson ante*; *Boyd v. De La Montagnie*, 73 *Id.* 498.

Even though the latter agreement in *Tallinger v. Mandeville, ante*, was illegal and against public policy, in providing for a separation of husband and wife, the law will never interfere, at the instance of either party, with what has been done in execution of an illegal agreement. It simply refuses to enforce such agreements, or such as are against public policy; but, so far as they have been executed, they cease to interest the public, and public policy is supposed to be best subserved by letting them alone and leaving the parties to them where they have placed themselves. *Id.* Since the obligation upon which she sues has been paid and discharged, it does not avail her to say that such payment and discharge were in pursuance of an agreement which was, in fact, illegal. The law will not, at her instance, either directly or indirectly, set aside or undo what has been done, on account of any illegality in the agreement. *Id.*

In *Spaulding v. Keyes*, 52 Hun, 612, the wife loaned money to her hus-

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band at various times, for which with the interest the husband gave her a chattel mortgage, in order to secure the amount. This money originally belonged to the husband. He received it as a bounty for enlisting as a volunteer in the United States service, and gave it to his wife. It was held that the gift was valid, the money could not be reached by the husband's creditors, and the consideration for the wife's mortgage was sufficient to uphold it.

In the *Bowery Nat. Bank of New York v. Sniffen*, 54 Hun, 394, an action was brought upon a promissory note, given in 1887 by a married woman, payable to the order of her husband, who had indorsed the same before its maturity to the plaintiff. The maker of the note was a married woman who claimed that the note was delivered without consideration therefor. The court directed a verdict for the plaintiff and ordered the exceptions to be heard in the first instance at the general term.

The plaintiff was undoubtedly a *bona fide* holder of the note in question, having paid full value therefor to the payee. But, notwithstanding this fact, as the law stood prior to the enactment of chapter 381 of the laws of 1884, no right of recovery existed.

In the case of the *Second Nat. Bank of Watkins v. Miller*, 63 N. Y. 639, it was definitely held that, where a married woman had made certain notes payable to the order of her husband, which were presented by him to the bank, the notes were nullities, and no implication, presumption or impression that she was to be benefited by them in her business or estate could be drawn from their form, or from the fact that she had given them to her husband for the purpose of having them discounted, but that, in order to charge her, it must be made to appear by evidence *aliunde* the instrument that they were, in fact, made in her separate business or for the benefit of her separate estate. The same rule was laid down in the *Saratoga County Bank v. Pruyn*, 90 N. Y. 250.

The fact that she owns a separate estate is not alone sufficient. *Id.*; *Broome v. Taylor*, 76 N. Y. 564. In the first cited case it was held that a married woman cannot bind herself by contract, unless, (1), the obligation was created by her in or about carrying on her trade or business; or (2), the contract relates to or is made for the benefit of her separate estate; or, (3), intention to charge separate estate is expressed in the instrument or contract by which the liability is created—, *The Manhattan Brass & Mfg Co. v. Thompson*, 58 N. Y. 80; *Nash v. Mitchell*, 71 Id. 199; or, (4), the debt was created for property purchased by her.

The enactment of chapter 381 of the Laws of 1884 has made a change in the principle enunciated in these cases. *Bowery Nat. Bank v. Sniffen*, *ante*. By this section the rules laid down in the cases cited have been abolished, except so far as exceptions arise under § 2 of the act; and it is no longer necessary, in order to hold a married woman upon her contract, to prove that the obligation was created by her in or about carrying on her trade or business, or that the contract relates, or is made for, the benefit of

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her separate estate, or that the intention to charge her separate estate is expressed in the instrument by which the liability is created. *Id.*

The exception contained in § 2 of this act provides that this act shall not apply to any contract that shall be made between husband and wife. *Id.*

In this case the note made by the wife to the order of her husband was mere accommodation paper and a loan of her credit by her to her husband. In such case the note was no contract between the husband and wife. There was no obligation which could be enforced by the husband against the wife under any circumstances. Where two parties execute an instrument without any intention of creating an obligation between them, there is no contract. There was no intention on the part of the maker to contract with the payee, and no intention on the part of either of the parties that any obligations, as between themselves, should be entered into because of the giving of the note. Not until the bank had discounted the note in question and given the proceeds of such discount to the husband, did the contractual relation spring into existence. In the loaning of her credit to her husband the wife took this method, and in so doing no contractual relation was formed between the husband and the wife, nor was any contract whatever made between them by reason thereof. *Id.*

It may be a question whether it was the intention of the legislature to exempt contracts of this description from the operation of the first section of the act of 1884. It was probably its intention to guard the wife against the making of contracts between herself and her husband which might be enforced by him against her separate estate; and the policy of the law was not to promote traffic between the two except under the same restrictions that had heretofore existed; and it was contracts of this character to which the exception in the statute was intended to apply, and not to those transactions which are contracts in form between husband and wife, but which cannot be enforced until the right of some third party has intervened. That this construction of the act is in accord with its intention seems to be fortified by the passage of the act of 1887, which permits husband and wife to convey directly to each other real estate without intervention of a third person. By the passage of this act, the legislature indicated that it was its policy to allow husband and wife to do directly that which heretofore they had been only able to do through the intervention of some third party who really had no interest in the transaction.

The prohibition of the act of 1884 is against contracts between husband and wife; that is, agreements or instruments made between these parties which would be valid contracts under the provisions of the first section. The alleged contract in *Bowery Nat. Bank v. Sniffen*, *ante*, between the husband and wife arising out of the note in question is no contract at all, and is not valid even under the broad provisions of the first section of this act, and the exception contained in the second section thereof can have no application.

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In *Queens County Bank v. Leavitt*, 56 Hun, 647, an action was brought upon a promissory note made by a wife to the order of her husband, and containing a clause whereby she bound her separate estate for the payment of the note. The note was made for the accommodation of the husband, without consideration as between the husband and wife, and he endorsed the same and delivered it to the plaintiff for the purpose of taking up another note which the plaintiff held against him, and which was also made by his wife. She had full knowledge of the use to which the note was to be appropriated and made no claim of any diversion of the paper. And it was held that though the note was made by the wife for the accommodation of her husband, the existence of the debt from the husband to the plaintiff was a sufficient consideration between them to sustain a transfer of the note. *Schepp v. Carpenter*, 51 N. Y. 602. As it was an accommodation note, it did not inure as a contract between the husband and wife, for the reason that it had no inception until it was discounted or taken by the plaintiff in the place of the old note. *Bowery Nat. Bk. v. Sniffen. ante.*

Where there is no intention to create an obligation of the wife to the husband by the execution of a note, which has no inception as a contract until its delivery for discount or in payment, chapter 381, Laws of 1884, respecting the capacity of married women to make contracts, and the reservation and proviso contained in the second section of this act, can have no application. *Queens County Bank v. Leavitt, ante.*

Where it is the intention of the wife to become surety for her husband, she had capacity and competency to enter into such an obligation previous to the law of 1884, and her obligation thus assumed is valid and binding. *Id.*; *Corn Ex. Bank v. Babcock*, 42 N. Y. 613.

In *Granger v. Granger*, 41 Hun, 638, the plaintiff and defendant were husband and wife. An action was brought by the husband upon a promissory note executed by the wife payable to his order, for the consideration of the release by him of an agreement that he had with her to work her farm on shares. And it was held that, as the note was given upon a contract pertaining to her own separate estate, she was bound by such contract whether or not the same could be enforced in an action at law.

In *Westerfield v. Jackson*, 41 Hun, 645, a wife, who from 1874 until her death in 1878 was weak mentally and incapable of taking care of herself or her property, had an income from her separate estate of \$1,000 a year, which was paid to her husband during this time. In 1876, certain taxes and assessments were paid upon a portion of her separate estate in the name of the husband, and about the same time he procured from her a demand note for \$1,123.75, for moneys advanced on account of taxes and assessments on, etc. Less than a month after the note was executed the husband received \$1,500 belonging to the principal of his wife's estate. A suit was brought against the wife's executor to recover the amount of the note. And it was held that the action could not be maintained. The pre

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sumption was that the money, for which the note was given and by which the taxes were paid, was a part of the income of the wife.

No power existed at common law by which the husband and wife could, by contract between themselves, change the rights, liabilities and obligations which inhere to the marital relation. *Third Nat. Bank v. Guenther*, Buff. Super. Ct., July 13, 1888; *Beach v. Beach*, 2 Hill, 260. Among the liabilities thus created by the marital relation, always existing, and which still exists, is the obligation resting upon the husband to support and maintain the wife, and this without regard to whether the wife is, or is not, possessed of a sole and separate estate. *Maxon v. Scott*, 55 N. Y. 247; *Coleman v. Burr*, 93 Id. 17.

The unity of the husband and wife has not been destroyed by the several acts which have been passed by which her common law liabilities have been very largely removed, except so far as the statutes expressly provide. Accordingly, it has been held that a deed running directly from the wife to the husband was ineffectual to pass title. *White v. Wager, ante*.

It has also been held that, by conveyance of land to the husband and wife, their heirs and assigns, each becomes seized of the entirety. *Bertles v. Nunan, ante*.

So it has been held that the husband and wife are not authorized to form a co-partnership for the purpose of trade or business. *Kaufman v. Schoeffel*, 37 Hun, 140; *Fairlee v. Bloomingdale*, 67 How. 292; *Noel v. Kinney*, 31 Alb. L. J. 328; 15 Abb. N. C. 403; 106 N. Y. 74.

These authorities clearly show that only to the extent to which the common law disabilities have been removed the husband and wife may contract. And the intent of the legislature to still retain the oneness of the husband and wife, is made more manifest by the statute of 1884, which removed all disabilities with respect to contracts made by the wife, except contracts between herself and husband, which were expressly excepted. Since the obligation resting upon the husband to support and maintain his wife has not been modified or abrogated by any statute, no legal contract with the wife can be entered into which will relieve him from such obligation. *Nash v. Mitchell, ante*; *Perkins v. Perkins*, 7 Lans 19.

The several acts, as far as they relate to the separate estate of the wife, have removed all disability with respect to her dealings therewith.

By virtue of these enabling statutes, she may carry on a sole and separate business, is entitled to all the benefits arising therefrom, and subject to all the liabilities attaching thereto. She may transact business in person, or through an agent, and she may employ her husband to act for her as such agent. *Third Nat. Bank v. Guenther, ante*; *Knapp v. Smith, ante*; *Abbey v. Deyo, ante*; *Owen v. Cawley*, 36 Id. 600; *Baum v. Mullen*, 47 Id. 577.

She has the power to dispose of her separate estate for any legal purpose to as full an extent as any other person possesses. In this respect the statutes have swept away the common law disabilities. *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Buckley v. Wells*, 33 N. Y. 518.

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This right which the statute has conferred upon her, does not authorize her to make illegal contracts, nor do they dispense with any requirement, which the law imposes, with respect to the ownership of property. It is not accurate, therefore, to say that she may deal with her property as she sees fit, or consume it in the payment of what the husband is legally liable to pay, if thereby the right of creditors are affected. As between husband and wife, she having received the benefit of the husband's services, cannot recover back from him what she has paid as family expenses under contract with him. But while the wife may not, creditors who are prejudiced thereby may, take advantage of the executed void agreement. They have the right to assume, when dealing with a married woman, that her property will not be absorbed by her husband in right of any void agreement, or that her property will be used in the payment of obligations legally resting upon him to pay, while he at the same time exhausts her estate by accumulating salary. This in part is the principle which controlled the decision in *Coleman v. Burr*, 93 N. Y. 17, and *Whitaker v. Whitaker*, 52 N. Y. 378.

Under the provisions of the act of 1860, a wife may contract with her husband, as well as with third persons, in respect to her separate property. *Benedict v. Briggs*, 34 Hun, 94. Thus, it has been held that she may employ him as her agent to transact any or all of her business, *Fairbanks v. Mothersell*, 60 Barb. 406; she may contract with him to work for her by the job or otherwise at a stipulated price, *Id*; she may take title to personal property, directly from him, by purchase for a valid consideration, *Savage v. O'Neil*, 42 Barb. 374; affirmed, 44 N. Y. 298; *Brace v. Gould*, 1 N. Y. S. C. 226; or by gift, in case no rights of creditors are affected thereby, *Mack v. Mack*, 3 Hun, 323; *Rawson v. Penn. R. R. Co.*, 48 N. Y. 212; *Reed v. Gannon*, 50 *Id.* 345; she may maintain an action at law upon a claim assigned to her by her husband, *Seymour v. Fellows*, 77 N. Y. 178; and it has been held that a promissory note given by a husband to his wife in consideration of her releasing her inchoate right of dower in real estate, by joining in a deed, and without intent to defraud his creditors, is valid. *Brooks v. Weaver*, 3 Alb. Law J. 283. So it was also held valid where the consideration of the note given by the husband was in part the wife's services and in part the services of their minor son. *Id.*; *Benedict v. Driggs*, *ante*.

In this case an action was brought upon a promissory note made by the defendant payable to his wife or bearer who died intestate. The plaintiff is the sister of the deceased, and had possession of the note a short time preceding the death of the payee. It was transferred to her for money loaned to the payee at different times. And it was held that, as the note purported to be given by the husband for a valuable consideration received from his wife, it was valid and enforceable by her, and equally so by the plaintiff, without regard to what consideration the latter had paid therefor.

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The note was not a nullity by reason of the inability of husband and wife to make a contract of that nature with each other.

In *Kelso v. Tabor*, 52 Barb. 125, it was held that it is only in relation to the control and management of such property as a married woman may acquire under the provisions of the statutes of 1848, 1849, that her incapacity to make contracts has been removed by these acts. In all other respects, her incapacity by reason of the marriage relation remains unchanged as it was at common law, before these statutes were enacted. The powers conferred upon married women, by these statutes, are in derogation of the common law, and are, therefore, to be strictly construed; they are not to be made, by construction, to extend to any object or purpose beyond that of managing the estates by the persons intended to be benefited. The note of a married woman, which would be otherwise void as a contract, is not validated and made binding by the insertion in it of a direction or charge that the indebtedness therein created may be charged upon her separate estate. Consequently, a promissory note, given by a married woman as surety for her husband, and for his liability on a bond given by him as deputy sheriff to his principal, and for defalcations on account of moneys collected by him as such deputy, is not binding upon her at law, notwithstanding it is expressed in the note, "and she hereby charges her separate estate with the payment of this note." Nor is there any liability in equity arising upon such a consideration. *Id.*

But where a married woman, having separate estate, endorsed her husband's promissory note as his surety without consideration, and without benefit to her separate estate, but which endorsement expresses that, for value received, she thereby "charged her individual property with the payment of this note," it was held, in *Corn Ex. Ins. Co. v. Babcock*, *ante*, that an action on such endorsement is maintainable. See *Carpenter v. O'Dougherty*, 50 N. Y. 660; *Maxon v. Scott*, 55 Id. 274; *Manhattan B. & M. v. Thompson*, 58 Id. 80; *Third Nat. Bk. v. Blake*, 73 Id. 260; *Loomis v. Ruck*, 56 Id. 462; 74 Id. 82.

In *Woodman v. Penfield*, 53 Hun, 638, it was held that a transfer of property between a husband and wife is valid and will be upheld when made in good faith and founded upon a sufficient consideration. See *Woodworth v. Sweet*, 51 N. Y. 8; *Benedict v. Driggs*, *ante*.

It was held in *Jacox v. Caldwell*, *ante*, that, where a husband, married prior to the acts of 1848, declined to assert his marital rights to the personal property of his wife, but borrowed money from her with the understanding and agreement that it shall be repaid, the agreement is for a good consideration, and imposes an equitable obligation upon the husband; and that there is no ground for a distinction between cases where, at the time of marriage, the property is money in the possession of the wife, or where it consists of choses in action. At common law all the personal property of the wife vested absolutely in the husband at the moment of marriage, and all she acquired during coverture immediately became his property.

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This was equally true in respect to her choses in action, as any other species of her personal estate. And when they were reduced into the husband's possession, there was no greater equitable consideration for a voluntary appropriation of the proceeds to the use of his wife, or his promise to do so subsequently, than of any other personal property owned or acquired by her of which he had possession.

In *Newton v. Manwarring*, 56 Hun, 645, on a settlement of accounts between defendant and her husband, the latter agreed to procure the assignment to her of a mortgage, on land formerly owned by him and which had been sold subject to said mortgage, in payment of what he owed her. And it was held that, whatever may have been the intent on the part of the husband in making these settlements with his wife for money and property theretofore received of her and in acknowledging an indebtedness to her of a sum nearly equivalent to the amount due upon the mortgage assigned to her, a subsequent mortgagee is not in a situation to allege that such settlement, and the transfer of the mortgage in payment of the sum found due, was fraudulent and void because made to hinder and delay the husband's creditors. *Allyn v. Thurston*, 53 N. Y. 622; *Briggs v. Austin*, 55 Hun, 612. As the said mortgagee was not a creditor of the husband, he can derive no aid from the doctrine laid down in *Coleman v. Burr*, 25 Hun, 240; affirmed 93 N. Y. 17. In that case, the plaintiff was a judgment creditor of the husband, and his action was brought to set aside a conveyance made by the husband to his wife, on the ground that such conveyance was without consideration and was executed with the intent to defraud the husband's creditors.

If the wife was only entitled to hold the mortgage as a security for the loans and advances of money or property to her husband actually made, she was entitled, as he had voluntarily agreed to pay interest thereon, to hold the same for the amount of the principal and the interest as well. And even though the plaintiff was in the position of a creditor challenging the settlement between her and her husband as fraudulent, still, if the debts were valid and the claims were honest against the husband, his agreement to pay interest thereon and allowance thereof in the settlement with her would be valid. *Newton v. Manwarring*, *ante*; *Spencer v. Ayrault*, 10 N. Y. 202. The money and property which the husband received from the wife was upon an agreement that the husband should pay her for the same; and, according to *Jacox v. Caldwell*, *ante*, the agreement is for a good consideration, and imposes an equitable obligation upon the husband. And where a preference to the wife, in an assignment for the benefit of creditors, was made in good faith without an intent to defraud, it is valid and does not vitiate the assignment. *Id.*

In *Sherman v. Scott*, 27 Hun, 331, the husband and wife entered into an oral agreement by which the husband agreed to procure certain real estate to be conveyed to her, and she agreed to execute to him a lease thereof for the term of his life, and also to make a will devising the residue to him in

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case he should survive her; and in case he should not survive her to give certain legacies to persons named and devise the residue of the property to other persons. The land was conveyed to the wife, and she executed the lease as agreed, but never made the will, though she recognized the obligation to do so. The husband survived his wife, and thereafter assigned the cause of action upon the said agreement to one of the persons who was to have been a legatee under the proposed will. And it was held that the assignee could maintain an action against the heirs-at-law of the wife to compel the specific performance of the agreement.

In *Rawson v. Penn. R. R. Co.*, 2 Abb. N. S. 220, it was held that, under the statute of 1862, the common law rule that a wife cannot take by gift directly from her husband without the intervention of a trustee, was abrogated, and that she could maintain an action for the loss of articles of personal property, which she had acquired in this manner. This case was affirmed on appeal to the court of appeals, 48 N. Y. 212.

It has been held that a transfer of personal property directly from the husband to the wife in payment of a debt which he owed her when she held a separate estate, was valid. *Brace v. Gould, ante*; *Clunder v. Lynch*, 4 Keyes, 461. Of a like import is *Savage v. O'Neil, ante*, where it was distinctly held that a wife can enter into contract for the purchase of personal property from her husband, and after delivery can hold it by a strictly legal title.

It has been frequently held that the husband has the right, and owes the duty, to pay to his wife an obligation arising for loaned money and that he can prefer it in a voluntary assignment for the benefit of his creditors. *Id.*; *Schaffner v. Benton*, 37 Barb. 45; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49; *Woodworth v. Sweet*, 44 Barb. 268; 51 N. Y. 8; *McCartney v. Welch*, 44 Barb. 271; *Jacox v. Caldwell*, 37 How. 241; *Winans v. Peebles*, 32 N. Y. 423; *Borst v. Spelman*, 4 Id. 284; *Babcock v. Eckler*, 24 Id. 623; *Livingston v. Livingston*, 2 John, Ch. 537.

The payment of such a debt by the husband is not void in such a sense as to leave the title to the money paid in him; and the same must be true if payment is made in any other property. After property is transferred and delivered to the wife by the husband in payment of notes held by her against him, it belongs to her, and she holds it by virtue of the statutes of 1848, 1849, and the laws amendatory thereof, by a strictly legal title, good against her husband and all his creditors. A wife can enter into contract for the purchase of personal property from her husband; and though such a contract will be void in law, it could, if founded upon a sufficient consideration passing from the wife, be enforced against the husband in equity. While the contract remains executory, and the husband has not delivered the property to the wife, she will have against him a merely equitable claim. But after he has delivered the property to her, she will hold it by a strictly legal title, as she holds her other separate property. *Savage v. O'Neil, ante*. So a wife

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can loan money to her husband, and before repayment by him, she has a claim against him which she can enforce in equity, and which she cannot enforce at law, but he owes her the duty of payment; and, when he has voluntarily paid her, then she holds the money paid by a strictly legal title, as she holds her other money, and it can make no difference whether she is paid in money or other property.

An agreement by a husband to convey land to his wife, extorted by her as a condition of signing a mortgage on which to raise money with which to meet his necessities, is inequitable and should not be enforced. *Carpenter v. Carpenter*, 56 Hun, 647.

In this case, the sole consideration of the contract was the execution of the wife of a mortgage for \$2,000, by which she subjected her dower right to the lien of such mortgage. Her inchoate right of dower could not exceed in value a few hundred dollars, and for this she claimed she was to receive a conveyance of lands worth \$7,000. And it was held that, as the husband required the money, and the wife took advantage of his necessities to obtain the promise to convey such an agreement should not be enforced, especially where the husband offers to pay off the mortgage, which will restore the wife to her original position.

In *Whitaker v. Whitaker*, *ante*, it was held that the meritorious consideration arising out of the duty of a husband to support his wife is not sufficient, in equity, to sustain a promissory note given by the husband to the wife, as against the collateral heirs of the former.

In *Boyd v. De La Montagnie*, *ante*, it was held that a gratuitous transfer of property from a wife to her husband, induced in part by representations on his part that she was liable for a debt, for which in fact she was not liable, and made in the belief that the effect of the transfer would be to delay the creditors, or in some way to save the property, will be set aside by a court of equity; and that, in order to sustain an action for that purpose, it is not necessary to show a fraudulent intent on the part of the husband in making the representations; that a mutual misapprehension or mistake is sufficient. A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband occupies such a relation to the wife, and the equitable principles referred to would apply to them in respect to gratuitous transfers by the wife to the husband, however it might be in ordinary business transactions, in which the wife may legally engage. When this relation exists, the person obtaining the benefit must show, by the clearest evidence, that the gift was freely and deliberately made. The burden in such case is upon the person taking the gift to show that the transaction was fair and proper. *Boyd v. De La Montagnie*, *ante*; *Sears v. Shafer*, 6 N. Y. 268; *Ford v. Harrington*, 16 Id. 285.

And the fact that the wife consented to the transfer to defraud creditors

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does not constitute a defense. The parties do not stand on equal terms, and the husband cannot avail himself of the plea of *particeps criminis* on the part of the wife. *Boyd v. De La Montagnie, ante*; *Freelove v. Cole*, 41 Barb. 318; affirmed, 41 N. Y. 619. And even though he supposed the transfer was really made from motives of love and affection, yet, if the wife, though entertaining a sufficient affectionate regard for him to have made the transfer, was, in fact, induced to do it under the supposition of the liability, and would not have done it otherwise, and this belief was produced by the untrue statements of the husband, although he may have believed them true, the wife, within the principles above referred to, is entitled to relief. *Boyd v. De La Montagnie, ante*. And her legal right to a re-transfer is not impaired by the fact that she intended to give the property to her husband by will.

Obligations in settlement of matrimonial actions.—In *Van Order v. Van Order*, 8 Hun, 315, a wife who has commenced an action against her husband for divorce on the ground of his adultery, entered into an agreement in writing with him, whereby, in consideration of a sum of money to be paid to her by him, she agreed to discontinue the action, to condone the adultery, to give up to him the custody of their child and relinquish her right of dower in his estate. In an action brought by her on this agreement, it was held that a wife has no power to enter into such a contract with her husband, and that the agreement to pay the money was void. The promise by the husband to pay money to his wife, in consideration of her condoning an act of adultery committed by him, is in violation of the rules of law and public policy and will not be enforced by the courts.

In *Adams v. Adams*, 24 Hun, 401, the wife left her husband and brought an action against him to procure a divorce on the ground of his adultery. After some evidence of his guilt had been given on the trial, she agreed with him to discontinue the action, without costs to either party, and to return to and live with him on condition that he should give his note for \$1,000 to her father for her benefit. The note was given, the suit discontinued, and the wife returned to and lived with her husband for several years. She afterwards left him, the note was assigned to her, and she brought an action on it against the husband. It was held that the note was founded upon a good consideration and not void as against public policy; that she was entitled to bring an action at law upon the note, but that, if she could not maintain an action at law, equitable relief might be afforded her under a complaint stating the facts.

This case is distinguishable from that of *Van Order v. Van Order, ante*. In the latter case, it does not appear that there was any proof of adultery, or that the divorce action could have been maintained. The agreement was one for a future permanent separation, without proof of a violation of the marriage contract; and the case was well decided upon the facts.

In *Bolen v. Bolen*, 44 Hun, 362, the wife took her departure from the residence of the husband in 1885, and commenced an action against him

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for a dissolution of the matrimonial bonds, for certain unlawful acts on his part. A settlement and discontinuance of that action was effected, whereby the wife undertook to return to her husband and live with him, and perform her duties as his lawful wife, and the plaintiff was to be allowed to keep his boy in his house and family as a member thereof. The husband was to and did execute and deliver to a third person a bond and mortgage for the payment of \$8,000 for the use of the wife, which was to be and was assigned to her, and she now holds the same. The wife returned to the residence of her husband, but refused to permit the return of the boy, and threatened to leave her husband's house as soon as the child was brought there to reside; and in fact, when he was brought to the house to live, she left and persists in her refusal to return and live with her husband as his wife. This action was thereupon commenced to procure the cancellation and surrender of the bond and mortgage. And it was held that the husband was entitled to the relief sought.

The contract between the parties was that the wife should return to her loyalty and perform her duties to her husband for all time during her life, and permit his son to remain under his roof and constitute a member of his family, and to discontinue her action; and for all this he was to execute the mortgage in question. As he has performed and she has not, she cannot retain the mortgage.

In *Dewey v. Durham*, 19 W. Dig. 47, the plaintiff and his wife, after living together for twenty years, agreed to separate for the rest of their lives. Plaintiff agreed to pay his wife \$1,000, which he did by assigning to her a bond and mortgage. She promised to give him a bond indemnifying him against her future support. After they had lived apart for a short time, plaintiff agreed that if his wife would return, she could retain the securities as her own; and she returned accordingly and lived with him until her death. The interest on the bond and mortgage was received by her, and the principal was finally paid into the bank to her credit and controlled by her during her life; but she never gave the indemnifying bond. And it was held that, as the contract was fully executed, the wife acquired a valid title to the securities. Her agreement to return was a good consideration for her husband's promise. *Adams v. Adams*, 24 Hun, 401; affirmed 91 N. Y. 381. Equity would have enforced his agreement prior to the Married Woman's Act of 1848. And even a mere naked gift from husband to wife will be sustained, where creditor's rights are not affected. 88 N. Y. 299; *Dewey v. Durham*, *ante*. In the latter case, it was held that the husband waived the wife's failure to give the bond of indemnity.

Gift.—The husband may make a valid gift of personal property directly to his wife. *Armitage v. Mace*, 96 N. Y. 539; *Phillips v. Wooster*, 36 Id. 412; *Rawson v. The Penn. R. R. Co.*, *ante*; *Whiton v. Snyder*, 88 Id. 299.

When the husband and wife are living together, a gift to the wife by the husband of chattels, at the time in his possession, and in the house occupied by both, unaccompanied by any actual change of possession, would

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be clearly invalid as against creditors and purchasers. *Reed v. Gannon, ante*. But if the chattels were bought by the wife, and brought into the house as her property, and notoriously recognized as such, never having been there as the property of the husband, her title, in the absence of fraud would be valid, even as against creditors or purchasers from the husband, and stand upon the same footing as though she had herself made the purchases in her own name with funds given her by the husband. It does not necessarily follow that, because they are in the house which she and her husband jointly occupy, they are in his possession or legally subject to his control. *Id*.

The gifts and voluntary conveyances of a husband to his wife, made without fraudulent intent, at a time when he is indebted to no one, are in equity valid and effectual, and are not to be called in question in a court of equity, by his subsequent creditors. *Phillips v. Wooster, ante*; *Sexton v. Wheaton*, 8 Wheat. 419; *Neufville v. Thomson*, 3 Ed. Ch. 92; *Borst v. Spelman*, 4 N. Y. 284. Subsequent indebtedness cannot be invoked to make such a conveyance fraudulent, if it was honest and free from impeachment at the time it was made. *Phillips v. Wooster, ante*; *Babcock v. Eckley*, 24 Id. 630; *Reede v. Livingston*, 3 John. Ch. 500; *Seward v. Jackson*, 8 Cow. 406.

Equity has always sustained a gift from a husband to wife, when the claims of creditors were not affected, and when the gift was clearly proved. *Mack v. Mack*, 3 Hun, 323; *Westerlo v. DeWitt*, 36 N. Y. 346; *Doty v. Willson*, 47 Id. 583; *Van Deusen v. Rowley*, 8 Id. 358; *Bedell v. Carll*, 33 Id. 581; *Allen v. Cowen*, 23 Id. 502. The reason why such gifts have been held invalid in law, seems to have been derived from the common law idea that the husband and wife are one, and that her personal property becomes his by virtue of the marriage relation. So far as property is concerned, this rule no longer prevails in this state. The wife now holds her separate estate and the unity of the husband and wife does not, in law, create a union of her, with his property. *Mack v. Mack, ante*. There is no good reason why the law should permit a gift to a stranger, and deny it to the wife. It is now, undoubtedly, the law of this state that a husband may make a valid gift to his wife, where the claims of creditors do not intervene. *Id*.

The title in the wife's paraphernalia is in the husband when he has paid for the articles and furnished them. *Curtis v. D. L. & W. R. R. Co.*, 74 N. Y. 116. Nor do the statutes in reference to the rights of married women and gifts of personal property from the husband to the wife affect the husband's right until a gift has been actually made and is proved. Where the evidence does not show any such gift, the right of the husband is paramount and should be upheld; but where there is a gift, the wife may bring the action, otherwise the husband must sue. *Id.*; *Rawson v. Penn. R. R. Co.*, 2 Abb. N. S. 220; 48 N. Y. 212; *Rodgers v. L. I. R. R. Co.*, 1 N. Y. S. C. 396.

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In *Tyrrell v. York*, 57 Hun, 292, it was held that, while slight evidence of gift may suffice as to a wife's personal ornaments, an executed gift as to such things as furniture, which are in common use in the family, must be shown by delivery to the wife and possession by her. The ordinary use in the family does not show her possession.

In this case the plaintiff claimed that certain furniture was given to her by her husband in consideration of her returning and living with him after commencing an action for divorce. It appeared that she, with knowledge that the defendant had a wife living, went with him to Jersey City and was married to him there. There was no evidence that defendant was divorced from his former wife. And it was held that these facts showed that the relationship between her and defendant must have been known to her to have been illegal, and her promise to continue therein can afford no valid consideration for a contract on his part.

For an injury to or conversion of the wife's paraphernalia during coverture, the husband was, at common law, the proper party to sue, and this rule has not been changed by our statutes, except so far as the wife can, in any case, claim the paraphernalia as her separate property. *Rawson v. Penn. R. R. Co.*, *ante*.

Prior to the legislation in this state in reference to the rights of married women, gifts of personal property from husband to wife would be upheld in equity, though void at common law, and such gifts could be impeached only by creditors. *Id.*; *Graham v. Londonderry*, 3 Atk. 393; *Deming v. Williams*, 26 Conn. 226; *Borst v. Spelman*, *ante*; *Neufville v. Thompson*, 3 Ed. Ch. 92. In equity the property given would be treated as the wife's separate estate, and she would be protected in its enjoyment and possession, even against the interference of her husband. This estate, under the statutes of 1843, 1849, 1860 and 1862, if not absolutely converted into a legal estate, is clothed with all the incidents of such an estate and the wife is the proper person to sue and be sued in reference thereto.

A married woman, as a necessary incident to her right to acquire property and possess it, independent of the control or interference of her husband, although living with her husband, is competent to secure and maintain legal possession of property acquired by her free from the rights of persons claiming an interest therein through or under her husband. *Stanley v. Nat. Union Bank*, 115 N. Y. 122. She, under the statute, has the capacity to engage in business for herself, to acquire property and possess it free from the control or interference of her husband. When the sale of property is made while she is in possession of the farm upon which it is situated, under a conveyance thereof from a person having lawful possession and legal right to lease it, it immediately becomes subject to her dominion and control as the owner of the real property upon which it is situated and in whose cultivation and enjoyment it is employed. *Id.*; *Knapp v. Smith*, *ante*. She could not maintain the rights conferred upon her by law without holding that she had the lawful possession of such personal property.

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Stanley v. Nat. Union Bank, *ante* ; Rowe v. Smith, 45 N. Y. 232. The law does not require a family to be broken up, or a wife to separate from her husband, to enable her to acquire and maintain possession of property lawfully owned by her.

At common law the presumption of ownership drawn from the possession of personal property utterly failed in the case of a married woman because as against her husband, asserting his marital rights, she could not own such property. Whiton v. Snyder, *ante* ; Curtis v. D. L. & W. R. R. Co., *ante*. The marriage vested in the husband the right to reduce to his possession and ownership the wife's choses in action, and gave him the title to her personal chattels at once and absolutely. Jacox v. Caldwell, *ante*. But by statute some modified ownership and control was given to the wife, though still largely subservient to the title of the husband. The familiar phrase, "*bona paraphernalia*," became the settled description of the wife's personal clothing and ornaments, and indicated in them a modified property recognized and protected to some moderate extent. The husband could not devise them away, and after his death the widow could hold them as against his executors or legatees, but was obliged to surrender them to his creditors, where there was a deficiency of assets. Even the presents given by him to her before marriage, such as jewels, rings and pictures, could not afterwards be saved from his creditors. The paramount title of the husband was still preserved, since he could dispose of these articles absolutely in his own lifetime. Our Revised Statutes relaxed somewhat the rule and gave to the wife surviving the husband a title to her paraphernalia, which his creditors could not assail. Curtis v. D. L. & W. R. R. Co., *ante*.

Even in equity, the wife's paraphernalia were not considered as a gift to her separate use, because that would enable her to dispose of them absolutely, which was deemed contrary to the husband's intention. But, where the articles were provided by the husband, the right of the wife, so far as it existed, rested upon the foundation of a gift. And since the wife may now take by gift from her husband as well as from others, and by purchase from any one, her separate and personal possession of specific articles must draw after it the presumption of ownership, and there is no longer any reason for making her case exceptional, or excluding her from the operation of the general rule. Her wearing apparel and ornaments, given by her husband, pass into her personal and separate possession. Whiton v. Snyder, *ante*. But as to articles of a different character such as furniture and household goods, adapted to the use of, and used by, the family generally, and in their common possession, a different rule must apply. Although specific articles may be spoken of as the wife's, or as got for her, the difficulty of establishing an executed gift by showing a delivery, or a separate and personal possession, remains. Such cases must stand upon their facts, and can rarely be brought within the range of a presumption of separate ownership. Id.

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Where the property is in the wife's separate and individual possessions at a time when her absolute ownership is possible, the presumption arise, that she acquired it subsequent to the act of 1848, and the party who seeks to repel it must prove the acquisition before the enactment of the statutes relating to married women, and not ask the court to presume it. *Whiton v. Snyder, ante*; *Savage v. O'Neil, ante*. The apparent discord between the cases of *Rawson v. Penn. R. R. Co., ante*, and *Curtis v. D. L. & W. R. R. Co., ante*, exists only as to the fact of the gift. In the former case, it was said to have been established, but in the latter case not to have been established.

To contribute to the support of the family.—In *Hendricks v. Isaacs*, 46 Hun, 239, the plaintiff and his wife had disagreed and he was unwilling to provide for her support and that of the family. Certain moneys directed to be paid to the wife by the will of her husband's father were not immediately available after the decease of the testator. Advances thereupon were made by the plaintiff, which were used for the common benefit of the family, upon written instruments signed by plaintiff's daughter and approved by her mother, acknowledging the advance of the sum therein named from her father to be repaid from the interest due her mother, when received by her from the estate of the testator. After the decease of the wife a claim was made by the plaintiff to recover the amount of the advances, from moneys which had passed into the hands of the defendant as her administrator, and which were received under the said provision of the will. The claim was rejected by the administrator and was, under the provisions of the statute, sent to a referee, who directed the proceedings to be dismissed. On appeal from the judgment entered on the referee's report, it was held that while, at the common law, no action could be maintained upon such an agreement by the husband against the wife, he was entitled, where an agreement had been entered into between himself and his wife on a fair and just consideration, to seek redress in a court of equity. As the parties in this case resided in New Jersey, and the moneys were advanced and used there in the family of the plaintiff and intestate, the liability of the intestate and of her estate did not depend upon the construction and effect to be given to the statutes of the state of New York, but upon the statute of the state of New Jersey, relating to the property and rights of married women. And where no statute of the latter state was proved or read in the proceeding, the right of the plaintiff to maintain it must depend upon the general principles of equity which have been applied to the solution of controversies arising between husband and wife. *Id.*

The common law doctrine that husband and wife cannot contract with each other has not been changed in this state by legislation respecting the rights of married women. *Hendricks v. Isaacs*, 117 N. Y. 411. The entire and absolute disability of married women to enter into any legal contract, which was a stubborn and inflexible principle of the common law, has,

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indeed, in some respects, been modified. She may now, under our laws, purchase real and personal property and carry on business on her own account; and, as incident to these rights, she may enter into contracts with third persons for the purchase and sale of property, or in the prosecution of her separate business, enforceable in a legal action to the same extent as though she was a *femme sole*. But the disability to deal with her husband, or to make a binding contract with him, remains unchanged. Contracts between husband and wife are invalid as contracts, in the eye of a court of law, to the same extent now as before the recent legislation. *Id.*; *Yale v. Dederer*, 18 N. Y. 265; *White v. Wager*, *ante*; *Freckling v. Rolland*, 53 *Id.* 422; *Cashman v. Henry*, 75 *Id.* 103. If any exception to this principle exists, it has been created by the act of 1887.

But the doctrine of the unity of husband and wife, by which the legal existence of the wife was deemed to be merged in that of her husband, preventing them from contracting with each other as if they were two distinct persons, never prevailed in courts of equity. *Hendricks v. Isaacs*, *ante*. Courts of equity disregard the fiction upon which the common law proceeded, and are accustomed to lay hold of, and give effect to, transactions or agreements between husband and wife, according to the nature and equity of the case. This court does not limit its inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as matter of course, if a formal contract is established, but it further inquires whether the contract is just and fair and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it. This jurisdiction has been frequently exercised to enforce contracts or agreements for settlement, made between husband and wife before or after marriage, in favor of the wife, whether made with or without the intervention of trustees. It has also been exerted, though less frequently, to enforce agreements in favor of the husband for a settlement out of the property of the wife, or to charge her separate estate in his favor. *Livingston v. Livingston*, 2 John. Ch. 537; *Gardner v. Gardner*, 22 Wend. 526. But courts of equity do not entertain jurisdiction to enforce mere voluntary agreements, not founded upon any consideration, either in favor of the wife against the husband or in his favor against the wife. But if they have been consummated, and are fair and just, courts of equity will uphold the transactions, except as against creditors. *Read v. Livingston*, *ante*; *Hendricks v. Isaacs*, *ante*.

There is no doubt that the primary obligation is upon the husband to provide for the support of his wife and their infant children; and, as between the husband and wife, the latter is not bound to maintain her husband and children during his life out of her separate property, even though his means may be inadequate. But when the income of the wife has been applied with her consent to the maintenance of the family, she

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can make no claim for reimbursement out of her husband's estate. This question was considered in *Jaques v. The M. E. Church*, 17 John. 548, and it was there held by the court of errors, reviewing the decision of the chancellor, that, where the wife agreed by parol before marriage concurrently with the making of a marriage settlement, to defray the expenses of the family establishment out of her separate estate, the husband is not only not accountable for the moneys received by him of his wife, and expended for that purpose, but was entitled also for an allowance for all advances made by him therefor.

Where the agreement entered into by the wife is, in substance, to share with the husband in defraying the expenses of himself and the family and to reimburse him for advances made by him for her under the arrangement, there is a technical consideration for her promise, in the payment by the husband to her of a gross sum of money for expenses to be applied in her discretion, which he was not bound to do under his common law obligation to support his wife and children. *Hendricks v. Isaacs*, *ante*.

There is certainly no moral reason for forbidding a wife, having a separate estate, to contribute thereout to the support and maintenance of the family or to contract to do so.

In this case the father of the plaintiff died, leaving a will, by which he gave his estate to trustees in trust, among other things to pay over a portion of the income to plaintiff's wife, "to be by her applied to the maintenance and support of herself and her issue by her present husband." Soon after the death of the testator, plaintiff and his wife separated and thereafter lived apart, and the children, excepting one, remained with the mother and were supported by her. After the separation, plaintiff made advances to his wife, upon her written promise to reimburse him from the interest when received by her out of his father's estate. Upon the death of his wife, he presented a claim against her estate for the amount so advanced. And it was held that the contract was void at law, but, being reasonable and just, was enforceable and should be enforced in equity.

Agency.—It is sufficient if her possession is such as the circumstances of the case permit and such as she is capable of taking and enjoying; and, when she has done all that it is possible for her to do in this respect, it is a question of fact to be determined by a jury, whether she was, or was not, in fact, in possession of the property. *Id*.

That the circumstance that plaintiff's husband was employed as her agent in conducting the business of cultivating the farm after the property was acquired by the wife, is competent evidence to show the intent of the parties upon a question of fraud, has been adjudged in many cases; but it has also been frequently decided that it afforded no conclusive evidence of a fraudulent intent. *Id*; *Knapp v. Smith*, *ante*; *Abbey v. Deyo*, *ante*; *Buckley v. Wells*, *ante*; *Woodworth v. Sweet*, *ante*. In the last case, it was held that a wife could lawfully purchase property and carry on an independent business, employing her husband as her agent.

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It is permissible to a wife to employ her husband to conduct her business affairs, and the profits thereof inure to her benefit and not to the benefit of her husband, so long as the parties are acting in good faith, and not for the purpose of defrauding creditors. *Coddington v. Bowen, ante*.

In this case, it was held that the fact that a business belonging to a married woman is profitable mainly through the labor, energy and skill of her husband, who is its general manager, does not, so long as the parties are acting in good faith, make the profits liable for his debts.

The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous, he must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditors. *Abbey v. Deyo, ante*. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No country, unless both barbarous and heathen, has ever authorized a sale of the person of a debtor for the satisfaction of his debts. *Id*.

Since the passage of the act of 1860, there can be no longer a question that a married woman can carry on business on her sole and separate account, and that in such business she can purchase property for cash or upon credit, and that she can manage her business and property through her husband as her agent. *Id.*; *Knapp v. Smith, ante*; *Buckley v. Wells, ante*; *Gage v. Douchev*, 34 *Id.* 293; *Merchant v. Brunell*, 3 *Keyes*, 539; *Draper v. Stouvenal*, 35 *N. Y.* 507; *Samis v. McLoughlin*, *Id.* 647.

The creditors of an insolvent have no claim upon his services. They cannot compel him to work and earn wages for their benefit, and hence he does not defraud them if he chooses to give away his services by working gratuitously for another. The husband may, therefore, in the management of his wife's separate business or property, work for her, as any person might, without any compensation; and his creditors would not thereby gain any rights against the wife or her property, and would have no legal right to complain. *Abbey v. Deyo, ante*.

After the statutes of 1848, 1849, and independently of the act of 1860, a married woman might acquire the title to real or personal property by buying the same upon credit, and no interest therein would pass to her husband whether she had, or had not, antecedently, any separate estate. If the vendor would take the risk of payment, the transfer was perfect. *Knapp v. Smith, ante*. And after she had thus obtained property, she could manage it by the agency of her husband or any other, and hold the profits and increase to her separate use. *Id.*

In this case, it was so held, where the wife of an insolvent in 1851 bought from his assignees cattle which had been his, giving her promissory

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notes for the price, and purchased the farm, for the conveyance of which she had an executory contract, which was abandoned, she mortgaging it as security for the price, and subsequently employing her husband to manage the farm, the case being free from fraud.

It certainly was not the object of the Married Woman's Acts to introduce discord in the marital relation, or to disable husband and wife from interchanging offices of mutual service and affection. *Buckley v. Wells, ante*. To hold that a married woman could not avail herself of her husband's agency in the transaction of her business, nor apply a portion of her property to his support if occasion required, would sanction a rule in plain contravention of the policy in which these statutes had their origin. *Id*.

In the case of *Knapp v. Smith, ante*, it was held that, under the statutes of 1848, 1849, and independent of the act of 1860, a woman acquiring property from a third party, during coverture, could manage it through the agency of her husband, and hold the profits and increase to her separate use. In that case, and in the case of *Buckley v. Wells, ante*, the husband derived his support from the property of the wife, and received no other consideration for his services; but it was held that this did not impair her title to that, which belonged to her and never belonged to him.

The duty rests upon the husband to use his best efforts for the payment of his debts; but there is a duty which he owes alike to the public and to his family which is sacred, and that duty is, to provide for the nurture, education and support of his children. *Buckley v. Wells, ante*. He is said to be worse than an infidel who neglects it. In seeking employment for this purpose, he may apply to his wife, if she has a separate estate, as well as to a stranger. If the law allows her to hold property, her own at her marriage, or coming from others beside her husband and free from his control, of necessity she must be permitted to manage it herself, or she may employ others to act for her. As to such separate estate, she and her husband are as distinct before the law as though the marital relation did not exist. As to such property she acts as a *femme sole*, and may deal with her husband as with a stranger, and may, therefore, necessarily employ him and compensate him for its management. *Id*.

Since the wife holds her property as independent of the ownership and control of her husband as of a stranger, it is a manifest perversion of the laws, enacted for her benefit and protection, to declare that, when she employs her husband as her agent and entrusts the custody of her property to him, to buy and to sell, and, if possible, to get gains for her, she must thereby be considered as having made a free gift of the property to him. *Id*. But a wife, having separate property, can employ her husband as her agent. This question was distinctly settled in *Knapp v. Smith, ante*. What was said in *Sherman v. Elder*, 24 N. Y. 381, and which might be considered in conflict with *Knapp v. Smith, ante*, was but the dictum of the judge delivering the opinion, and does not appear to have been concurred in by the other members of the court; and the point was not decided in that case.

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But the case of *Sherman v. Elder* does expressly decide that the wife can make a valid assignment of her claims to a third person.

The court of appeals has frequently held that there is nothing in the marriage relation which forbids the wife from employing her husband as her agent in the management of her estate and property, and that such employment does not subject her property or the profits arising from such business, to the claims of the creditors of her husband. *Merchant v. Bunnell*, *ante*; *Sherman v. Elder*, *ante*; *Knapp v. Smith*, *ante*; *Buckley v. Wells*, *ante*; *Gage v. Douchey*, *ante*.

These cases conclusively establish the right of the wife to her separate estate, and that neither the same nor the profits derived therefrom, though such estate is managed by the husband as the agent of the wife, can be subjected, by the creditors of the husband, to the payment of his debts. *Merchant v. Bunnell*, *ante*. In this case it was held as in *Buckley v. Wells*, *ante*, that a married woman is entitled to the profits of mercantile business conducted by the husband in her name, when the capital is furnished by her, and he has no interest but that of a mere agent.

In *Jones v. Walker*, 63 N. Y. 612, it was held that, to charge a wife for work done upon her premises, under a contract with her husband there must be some evidence that he acted as agent and not as principal and that his contract was for his wife, upon her credit and with her consent, with knowledge that her credit was pledged, and that she is the contracting party. His agency will not be assumed without any evidence. In this case, the only evidence relied upon to establish an agency, was the relation of the parties, and the fact that the wife knew the work was in progress, and did not object. The court held that these facts, under the circumstances, did not constitute any evidence of agency on the part of the husband, or tend to prove that the work was done on the employment of the wife, and that the plaintiff should have been nonsuited. This case was distinguished from *Gates v. Brown*, 9 N. Y. 205; *Fairbanks v. Mother-sell* 41 How. 274; *Fowler v. Seaman*, 40 N. Y. 592; *Hauptman v. Catlin*, 20 Id. 247.

Such is the relation of husband and wife and their mutual duty to act as the agents, each of the other, that a presumption of law would arise that the handling of her moneys by the husband was done in behalf and for the benefit, of the wife, and that she would reap all the profits and increase thereof. *Abbey v. Ferris*, 56 Hun, 642. And the burden is upon the husband to make out such a case as to defeat this legal presumption, and to establish the existence of an actual agreement between him and his wife for the borrowing of her moneys. *Id.*

In *Lynn v. Smith*, 35 Hun, 275, it was held that a receiver, appointed in proceedings supplementary to execution, cannot maintain an action against the debtor's wife to recover the value of services rendered by the husband in carrying on the separate business of the wife, where such ser-

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VICES were rendered without any express agreement on the part of the wife to pay him therefor.

The cases are numerous in which the husband resides with his wife upon her separate estate and is supported out of the proceeds thereof. The wife is not bound to support him, and, if she does so, it would be as reasonable to imply a contract on the part of the husband to pay her for his board, lodging, clothes, etc., as it would be to imply a contract on her part to pay him for the services that he may perform for her. On either hand, the services are performed, or the board and lodging furnished, by members of the same family, and under such circumstances that the law will presume that it was gratuitous and no pay was expected by either party.

But in *Kingman v. Frank*, 33 Hun, 471, an action was brought by a judgment creditor against the debtor and his wife, to reach property claimed to be applicable to the payment of the judgment. The wife owed the husband \$1,040 for services rendered by him for her under an agreement by which she employed him to manage and superintend a separate business carried on by her at a stipulated price per week. And it was held that there existed a valid indebtedness owing from the wife to the husband, and that the judgment creditor could maintain the action.

This case is clearly distinguishable from the case of *Lynn v. Smith*, *ante*. Here was an express promise to pay a stipulated price per week, and the action was brought upon the express promise. The case does not conflict with the views above expressed with reference to implied contracts.

Joint contracts.—In the case of *Fairlee v. Bloomingdale*, *ante*, it was held that a business co-partnership between husband and wife was not authorized by the statute, and that the common law disability to so contract together still existed. This subject was again considered in the case of *Graff v. Kinney*, 1 How. N. S. 59, in which the opposite result was reached. And it came up again in the case of *Noel v. Kinney*, *ante*, where the decision in the case of *Graff v. Kinney*, *ante*, was criticised and disagreed with, and the decision in the case of *Fairlee v. Bloomingdale*, *ante*, was concurred in. And in *Kaufman v. Schoeffel*, *ante*, it was held that the statutes of this state, enabling a married woman to enter into contracts and to carry on any trade or business and perform any labor or services on her sole and separate account, do not authorize or empower her to enter into a copartnership with her husband for the purpose of carrying on a trade or business.

At common law, by reason of the unity of husband and wife, they could not contract together for a business copartnership. The married woman was disqualified from engaging in business by reason of the husband. By her marriage, her person was united with that of her husband, and they thereafter were regarded in law as one person. She could not contract separate and distinct from him. As soon as the husband died, her disability was removed. In using the words, "sole and separate," in the statute of 1860, the legislature doubtless had in mind the husband, and

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these words were intended to refer to him and to him only. It, by chapter 381 of the Laws of 1884, has now removed the disability of a married woman to contract, and she may now contract to the same extent, and with like effect, and in the same form as though unmarried; but it is expressly enacted that this act shall not affect or apply to any contract that shall be made between husband and wife, thus recognizing and continuing the construction given above to the statute. *Kaufman v. Schoeffel, ante.*

Business partnerships between husband and wife are not authorized by the statute of this state, and contracts in the conduct of such business are not enforceable against the wife. *Fairlee v. Bloomingdale, ante.* And any declaration of the wife that she sustains the relation to her husband of a partner in business is not binding upon her. *Id.*

Such partnership, or any partnership between husband and wife, would certainly have been impossible at common law. The rule then was that the husband and wife were one person in law. The very being or legal existence of the woman was suspended during the marriage, or at least was incorporated and consolidated into that of the husband, under whose wing, protection and cover she performed everything. This legal conclusion clearly forbade a partnership between them, which can only exist between persons having a separate legal existence and the one capable of contracting with the other. *Id.*

In a partnership, there can be no separate property and business, and the labor performed by one partner in connection therewith cannot possibly be on the sole and separate account of the partner performing it. There must be in every such case necessarily a joint, and not a separate, property and business, and services on joint account, and not on the sole and separate account of one partner.

It is very clear that the legislature has not authorized and does not contemplate a business partnership between husband and wife. And the court of appeals explicitly declares that these statutes do not cover and include a partnership between them, and that they touch a married woman in her relation to her husband only so far as they relate to her separate property and business and the labor she may perform on her sole and separate account; while in all other respects, the duties and responsibilities of each to the other remain as they were at common law. *Coleman v. Curr*, 93 N. Y. 17; *Fairlee v. Bloomingdale, ante.* If the relations between husband and wife are only changed by the statutes so as to allow her to own a separate property and conduct a separate business, and to receive the earnings from such separate property and business and from the labor she may perform on her sole and separate account, a partnership between the two cannot exist. In such case, the property, business and labor must always be joint and not separate; and because they are joint and not separate, and therefore not covered by the statute, the relations of husband and wife remain in regard thereto as at common law, which forbade a business partnership between them. *Id.*

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In *Noel v. Kinney*, 15 Abb. N. C. 408, it was held that, at common law, the unity of husband and wife precluded the existence of a co-partnership between them, and this disability has not been removed by the enabling acts of 1848, 1849, 1860 and 1862 ; and that a married woman cannot, therefore, be held upon a note signed by her husband in the name of a firm composed of her husband and herself.

But when this case went up to the court of appeals, 106 N. Y. 74, it was held that, where a wife authorizes her husband to contract in matters relating to, and for the benefit of, her separate estate, and, in executing such a contract, to use the name of a firm ostensibly composed of herself and her husband, she is liable upon an obligation so executed ; and this, without regard to the question as to whether such a firm in fact exists, or as to whether as matter of law they were capable of assuming the relation of co-partners.

If it is the present rule of law, that a husband and wife cannot be partners, and that a contract, which is in form a co-partnership contract, cannot be forced against her, then the statutes which enabled the woman to acquire and hold property, to bargain, sell, assign and transfer it, to carry on any trade or business and perform any labor or service on her own account, and which protect her in the enjoyment of her earnings from her trade, business, labor or services, and permit her to use and invest these earnings, are effectual only so far that she may alone or jointly with any person or persons other than her husband derive profit and increase from her work and gain from the use of her estate. If they are to be so limited in her favor, they may easily become, not merely enabling statutes for her benefit, but also, in her hands, instrumentalities of fraud.

There is no case in the court of appeals where a woman has successfully asserted her coverture as a defense to an action for the price of goods purchased by her ; and there is no reason why, as against creditors, she should be permitted to interpose the mere form of her promise as an obstacle to a recovery. It is settled that the things which the statutes permit her to do in person, she may also do by another as her agent. This is necessarily so, for she is allowed to act in respect to them as though unmarried ; and it cannot be doubted that the improvement of her land or the management of her personal property whether for preservation or business, may be conducted by her by means of any agency which any other owner of property might employ, and that the produce and increase thereof will be hers. *Id.* ; *Knapp v. Smith, ante* ; *Abbey v. Deyo, ante*. So she may do these things through her husband as her agent. *Id.* ; *Rowe v. Smith, ante*. She may also have such a community of interest with him in relation to real estate as will render her liable for his frauds relating to it ; and, when he, professing to act as her agent, makes false representations, though without her knowledge, and she receives the proceeds, she cannot retain the fruits of his frauds. *Krumm v. Beach*, 96 N. Y. 398.

As to all contracts relating to her separate estate, or made in the course

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of a separate business, she stands at law on the same footing as though unmarried, and can make negotiable paper which will be governed by the law merchant, and can be sued upon in the ordinary way by general complaint, and without special statements. *Frecking v. Rolland, ante*. And she cannot escape liability because she and her husband are joint makers of the note. In the case last cited, the action was on a joint promissory note signed by the husband and wife. He set up usury and she set up coverture.

The husband in this case, acting for himself and as agent for his wife, borrowed money with which to pay for a factory bought by her. The money was loaned to them, and was in part so applied. The note sued on was given for the money loaned and for services. The court held that the capacity of a married woman to make contracts relating to her separate estate, is incident to the power to conduct it; the latter would be barren and useless, if disconnected with the right to conduct it in the way and by the means usually employed. She became, in this case, a joint contractor with her husband, but she was as much bound to perform the joint engagement, as though the undertaking had been several, and she did not escape liability because her joint contractor was her husband.

It can make no difference in the measure of liability that in one case a married woman enters in her own name and her husband in his name in the execution of a joint obligation, and in the other case adopts a name which represents a joint liability, which may in effect also be several. Partners are at once principals and agents—each represents the other—and if, in the relation of partnership, there are obligations which a married woman cannot enforce against her husband or the husband against the wife, they involve no feature of an action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promiser to fulfill her promise.

In *Scott v. Conway*, 58 N. Y. 619, an action was brought for the price of labor and materials supplied to a theater carried on by Sarah G. Conway and her husband, Frederick B., under the name of Mrs. F. B. Conway's Brooklyn Theater. The wife and husband were jointly interested. And it was held to be no defense against one who dealt with her in ignorance of the partnership, that she had a dormant partner and that the rule was not changed by the fact that the partner was her husband.

In *Bitter v. Rathman*, 61 N. Y. 512, it was held that a married woman, who in secret trust for her husband becomes a member of a co-partnership, is to be regarded as the owner of the interest she represents, and can maintain an action for the dissolution of the co-partnership and for an accounting; and that, having suffered herself to be regarded by the public as a partner, she was liable as such to the creditors of the ostensible firm, though it may be otherwise in respect to her husband and his creditors. By becoming a partner either with a husband or another person, a married woman loses no right of property. And no principle can be suggested

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upon which her estate can be increased at the expense of creditors, nor how, either in her own name, or in her own name with that of another, or with another, she can purchase goods on credit to the advantage of her separate estate and not become liable for its payment. In the case of Noel v. Kinney, *ante*, the wife was as capable of contracting as though she had been unmarried, and adding to her estate by fresh acquisitions, and she was not permitted to escape payment or performance by joining to her own name that of her husband, or by combining the two into a firm or partnership name. It was by that name she chose to contract, and as between herself and creditors she is bound by it. Individuals may be liable as partners to third persons, while as between themselves they are not so liable. In this case the question is not between husband and wife. Though as to and with him she has no capacity to form a co-partnership, it by no means follows that she shall not be held upon a contract, made by him upon a consideration moving to her, where a third person, who parted with that consideration in reliance upon her husband's apparent, and which turns out to have been a real agency, seeks to enforce the contract. If the adoption of a firm name is a mere contrivance to carry on the business jointly, and at the same time put the property acquired and added to the wife's separate property out of the reach of creditors dealing with either *bona fide* as the partner of the other, it ought not to be permitted to have that effect. But if the wife is the sole owner of the property, and the husband has no interest in it, but for convenience they are doing her business in a firm name, her liability for a debt contracted in that name is entirely consistent with the fact, if it is a fact, that as between the parties themselves no partnership exists. If the arrangement is invalid only as between the husband and wife, the latter, who receives the profits of the transaction, cannot as against a creditor assert its invalidity. Though married she may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris*. Noel v. Kinney, *ante*; Bodine v. Killeen, 53 N. Y. 93. If by reason of any technical incapacity the husband and wife cannot contract with each other, or together as constituting that artificial entity, a firm or co-partnership, she is liable and the contract enforceable against her in favor of a creditor whose property has been added to her estate upon the strength of a promise made in her name by her authorized agent.

In Jacquin v. Jacquin, 15 Abb. N. C. 408, note, the husband brought an action against his wife for an accounting between them in a business partnership. He married her some time after they had become partners in business, and she thereupon took all the partnership property, refusing to account for any portion. The defense was that, as the parties were husband and wife, there could be no legal partnership between them.

And it was held that the enabling statutes, in relation to the authority of a married woman to hold property or transact business, have not expressly authorized her to enter into partnership with her husband, and no

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such authority or right is implied. Where the marital relation exists between plaintiff and defendant, there is no authority for the husband to claim, under a business co-partnership with his wife, the right to a dissolution of the same, and the appointment of a receiver. In the absence of any statutory enactment, the rule of the common law in relation to husband and wife remains unchanged; and as no express provision is made by statute for a business co-partnership between them, the old rule must prevail.

A married woman who contracts a debt with her husband in a business carried on for their joint benefit, cannot avoid liability for it on the ground of coverture. *Suau v. Caffé*, 122 N. Y. 308. The second section of chapter 90 of the Laws of 1860 provides that a married woman may carry on any trade or business on her sole and separate account. This language is broad enough to authorize married women to engage in business as partners or jointly with others and even with their husbands. A contrary construction is too narrow and fails to express the evident intent of the legislature, which was not to prescribe the mode in which married women could carry on their business, but to free them from the restraints of the common law, and permit them to engage in business in their own behalf, as free from the control of their husbands as though unmarried. Before this statute, the profits of their business belonged to their husbands, and the words "sole and separate account" were intended to convey the idea that the beneficial interest of any business, in which they might engage, belong to them and not to their husbands. Since the enactment of this statute, it has been held that husbands and wives may legally contract with each other in reference to their separate estate; *Id.*; *Owen v. Cawley*, *ante*; *Bodine v. Killeen*, *ante*; that they may become agents for each other; *Knapp v. Smith*, *ante*; and that a husband may assign to his wife a chose in action. *Seymour v. Fellows*, *ante*.

Partners are agents of each other and are joint and severally liable for the debts of the firm. These are two of the essential elements of a contract of partnership. Since husbands and wives may be the agents of each other, and may bind themselves by joint contract entered into with third persons; *Frecking v. Rolland*, *ante*; *Scott v. Conway*, *ante*; *Bitter v. Rathman*, *ante*; *Noel v. Kinney*, *ante*; there is no warrant in the statute for exempting them from liability to creditors for debts incurred by firms of which they are members. It has been so held in *Graff v. Kinney*, 37 Hun, 406, affirming 15 Abb. N. C. 397; *Zimmerman v. Erhard*, 8 Daly, 311; affirmed 83 N. Y. 74; opposed to these are *Chambovet v. Cagney*, 3 J. & S. 474; *Kaufman v. Schoeffel*, *ante*; *Fairlee v. Bloomingdale*, *ante*; 14 Abb. N. C. 341; reversed in 38 Hun, 220.

Upon principle and authority, therefore, when a husband and wife assume to carry on a business as partners and contract debts in the course of it, the wife cannot escape liability on the ground of coverture.

The provision of chapter 281, Laws of 1833, which provides that "no

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person shall transact business in the name of a partner not interested in his firm ; and when the designation 'and Company,' or '& Co.,' is used, it shall represent an actual partner or partners," is highly penal and will not be extended. *Zimmerman v. Erhard*, 88 N. Y. 74. It was intended to prevent the use of the name of a person not interested in the firm and thus inducing a false credit to which it was not entitled ; *Wood v. The Erie Ry. Co.*, 72 N. Y. 196 ; but it does not apply to, and is not intended to include, the use of a real name of an actual partner, even though such partner was under a disability at the time. The use, therefore, of the name of a *femme covert*, as one of a firm, where there was no intention to impose upon the public by obtaining undue credit, can not be regarded as a violation of either the letter or the spirit of this statute. *Zimmerman v. Erhard, ante*. The name used in such case is a real one, and the words "& Co." are in no sense fictitious or unlawful within the meaning of this provision. Whether a married woman can, or cannot, be a partner of her husband, it is quite obvious that such disability is not available to a debtor upon the ground that the words "& Co." does not represent a real party, and constitutes no defense to the claim of the husband and wife against him.

Joint ownership.—A note payable to husband and wife jointly belongs to the wife as survivor. *Sanford v. Sanford, ante* ; *Borst v. Spelman, ante* ; *Draper v. Jackson*, 16 Mass. 480. This is so, though the consideration is paid by the husband, if there are assets sufficient without this money to pay creditors. *Sanford v. Sanford, ante* ; *The R. C. Orphan Asylum v. Strain*, 2 Bradf. 34 ; *Scott v. Simes*, 10 Bosw. 314 ; *Schoonmaker v. Elmen-dorf*, 10 John. 49 ; *Craig v. Craig*, 3 Barb. Ch. 78.

Taking the note in the name of himself and wife shows that the husband intends thereby to give it to her, in case she survives him, and the delivery to her is unnecessary to perfect the gift. *Sanford v. Sanford, ante*. During the life of the husband the note is subject to his control and disposition. The wife has no legal interest in it until his decease. *Id*.

Where a party loans money and takes a note therefor payable to the order of himself and wife, it constitutes a gift of the note to the wife, if it remains unpaid in the hands of the husband at the time of his death and the wife survives him. *Sanford v. Sanford*, 58 N. Y. 69.

In *Gelster v. The Syracuse Sav. Bank*, 17 W. Dig. 137, it was held that, where a husband and wife have a bank account in their two names, and each draws and deposits money in the absence of the other, the husband is presumed in the absence of evidence, to own half, at least, of the sums standing to their credit.

The principles laid down in the case of *Sanford v. Sanford*, 45 N. Y. 723 ; 58 *Id.* 72, and reiterated in the case of *Bertles v. Nunan*, 92 N. Y. 152, and which have obtained since the existence of the common law, establish that a bond and mortgage executed to husband and wife becomes the property of the wife on the death of the husband. *Matter of Albrecht*, 56 Hun, 650.

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In the Matter of Brooks, 5 Demorest, 326, at the time of decedent's death, there was on deposit, in a savings bank, to the joint credit of himself and wife, a sum of over \$1,900. This amount the widow, after her appointment as administratrix, withdrew from the bank, and included one half of it, less \$150 set apart for her benefit, in an inventory of decedent's property. And it was held that an exception to a finding that the amount of the deposit was the joint property of decedent's estate and his widow, and that, in the absence of evidence as to the respective proportions, the latter was accountable, as administratrix, for only one half thereof, should be overruled.

It was held, in Rom. Cath. Orphan Asylum v. Strain, *ante*, that a deposit of moneys in the joint name of husband and wife, with the privity of the husband, must be taken as *prine facie* a gift of such moneys to the wife, in the event of her surviving her husband; and that, where such deposits had been left undisturbed by the husband, the moneys became on his decease the property of his wife.

The doctrine of this case was repeated by the supreme court in Platt v. Grubb, *ante*. The moneys on joint deposit which were there held to become the property of the wife, at the death of her husband, were distinctly found to have belonged, before the making of such deposit, to her husband alone. And the court held, that, by reason of the unity of husband and wife in the view of the law, an obligation taken in the names of both inures to the benefit of both, and the whole goes to the survivor. This old rule of law is still prevalent in this state. Bertles v. Nunan, *ante*; Sanford v. Sanford, 45 N. Y. 723; 58 N. Y. 72.

In the latter case, the court of appeals held that, where a husband had loaned money, the taking by him of a promissory note for its payment to the order of himself and his wife, imported a gift to his wife, in case she should survive him. Upon the second appeal, it was further held that the fact that the widow gave the note to the appraisers as a part of her husband's estate, while it is evidence tending to show that she had released to him her right of survivorship, is not conclusive, and does not stop her from claiming the note, in the absence of evidence that the position of any party has been changed in consequence, or that any transaction was had in reliance thereon.

There is nothing at variance with the principle governing this case in the decisions of Mulcahey v. The Emigrants' Ind. Sav. Bank, 89 N. Y. 435; Gelster v. The Syracuse Sav. Bank, 17 W. Dig. 157; Syracuse Sav. Bank v. Hess, 23 Id. 280.

No new powers conferred upon the husband.—Modern statutes in this state have wrought some changes in the relationship between husband and wife. The incapacity of a wife to make contracts has, to some extent, been removed by these statutes. Perkins v. Perkins, 7 Lans. 19. But except to the extent that this incapacity has been removed by statute, the marriage relation, in its oneness of unity, remains unchanged, as it was

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at common law before those statutes were enacted. The new powers conferred on married women by these statutes are in derogation of common law, and are to be strictly construed. *Id.*; *Graham v. Van Wyck*, 14 Barb. 531. These modern statutes relate only to the control and management by married women of their sole and separate estate. As to that, the wife is to be deemed a *femme sole*. But the husband has had no new powers conferred upon him, nor has he been released from any of the duties and obligations imposed upon him. His condition in the marriage relation is unchanged, so far as regards its unity. The wife is released from no part of its unity except in so far as it is expressed in these statutes.

The statutes of 1848, 1849, on their face and in their letter, recognize the disqualification of husbands and wives to contract with each other, in the right to take and receive estates from any person other than the husband. *Id.* These statutes are the beginning and they continue to be a part of a new system and policy, in relation to the separate estates of married women. *Id.*

The recent statutes made in her behalf, not his, have, to the extent expressed therein, enfranchised her as to those rights, and to those only. They have extended no powers and conferred no new rights upon the husband. If, when her separate estate is affected, she can sue and sue alone and by them is allowed even to sue her husband, if he interferes with it to her disadvantage, they have not, certainly not in express terms, conferred the corresponding right on him to sue her. They were passed for her, not his, protection. *Id.*

The unity of person, created by the marriage contract between husband and wife, has been no further severed than these statutes; in express terms or by necessary implication, have effected that purpose. The duty of the husband is now as ever to labor and provide support for his wife and it has not been changed by these statutes. They have not conferred the right upon husband and wife to make contracts between themselves to that end. *Id.*

There are various cases holding that married women having separate estates may employ their husbands as agents to assist in managing them. But this is quite a different thing from the holding that the husband may bring an action against his wife at law for his services. Such agency may be the best way in which he may labor to support his wife, or aid in doing so. She ought not to be deprived of this aid in managing her estate. This power to make contracts existed at common law, but it was as agent, and not as an independent and separate individual. The wife might be the agent of the husband, and in that character make contracts which would bind him; and such agency need not even be expressed, but was implied from a variety of circumstances. So, now, the husband may be the agent of the wife, in regard to her separate estate, and the term "contract between them" means just this—a contract of agency. *Id.*

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In *Fairbanks v. Mothersell*, *ante*, the court made the *obiter* remark that married women may make special contracts with their husbands in regard to their separate property, and let jobs to them of particular work, such as building and the like, the same as though they were strangers. This remark was not at all necessary to the decision of this case. It was not a question between husband and wife, or whether one could enforce at law such a contract against the other. It was a mere question of agency. The wife had given the husband the job of digging a cellar and laying the cellar wall upon her separate property, and agreed to pay, and did pay, him \$138 therefor. The husband employed the plaintiff to assist him, and the plaintiff supposed at the time that the husband was the owner. Afterward finding out the contrary and that the benefit and advantage belonged to the wife, he sued her, treating the husband as her agent, and so it was decided. But this case does not establish the right of a husband to sue his wife at law. This question did not arise.

In *Adams v. Curtis*, 4 Lans. 164, an action was brought by a wife against a copartnership, of which her husband was a member. The husband did not appear in the case and his copartner did not appear for him. She performed the work of the firm for which the action was brought. On appeal to the general term, the leading opinion merely held that such a contract could be made, and if made, could be maintained at law under the statute of 1862. One member of the court put his assent to the decision on the ground that the husband, not having appeared in the case, nor any one for him, there was no one to object to his being sued or to a judgment against him; and that even if he could not be sued, his copartner was bound at all events, and he could seek contribution over from the husband. The case, on either of these propositions, is not in conflict with the view that the statutes were passed to enfranchise married women, and to protect their property, and not to protect or extend rights to their husbands.

In the case of *Minier v. Minier*, 4 Lans. 421, it was held that a married woman may maintain an action against her husband to recover moneys entrusted to him by the wife, or for lands which had been purchased with such moneys and title taken in his name. This has always been the law of equity, and the modern statutes had not extended it to actions at law. The case is subject to criticism in respect to the remark of the judge that the act of 1862 warrants the bringing of a suit both by a wife against her husband and by husband against his wife. The latter part of the sentence was not a question before the court, and is in conflict with the direct holdings of the court of appeals in *White v. Wager*, *ante*, and in *Hunt v. Johnson*, *ante*. In the last case, the court drew the distinction between an instrument made by the wife to her husband and one from the husband to the wife, even at common law.

The language of the statute of 1862, that she may sue and be sued, is broad enough, in general terms, to include all parties that are several and equal, and under no disability; but it does not include persons who are

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under disability. The husband is, under the common law disability, unable to sue his wife. *Perkins v. Perkins, ante.*

This statute is not broad enough and does not divorce the husband from that disability, whatever it may do for the wife. It is not broad enough to absolve him from the liability, as well as the duty, to labor for the support and maintenance of the wife; nor does it authorize him to sue her for his support. The marriage contract, with its liabilities, cannot be so severed by legislative or judicial construction in favor of a husband. He cannot be so released from a binding civil contract. A contract on the part of a married woman to pay her husband for services rendered to her by him personally is clearly against public policy. If the statute contained an express provision authorizing him to maintain an action against her upon such contract it would be void on the ground of its being retrospective, in its operation upon marriages solemnized before its passage. *Id.*

Under the statutes of 1848, 1849, it was held, in some of the reported cases in the supreme court of this state, that the husband was entitled, not only to the fruits of his wife's labor, but also to the profits and increase of any business in which she may have embarked, though carried on in her name, by the aid of her separate estate. But the court of appeals, in *Knapp v. Smith, ante*, exploded this doctrine, and put the question upon the true ground, viz.: whether, in a given case, the transaction between husband and wife is sincere and *bona fide*, or a colorable device to cheat the creditors of the husband. *Gage v. Douchy, ante.* And this is always a fact, which upon proper evidence, should be left to the jury. *Id.*

The statutes of this state have not improved the condition of the husband in any respect, and he cannot now, any more than he formerly could, enter into a valid contract with his wife. *Id.* In this case it was held: that, where the wife was the owner of the farm upon which she resided with her husband, and which he carried on in her name, without any agreement as to compensation, neither the products of the farm, nor property taken in exchange therefor, can be attached by creditors as the property of her husband. It was not competent for husband and wife to make an agreement between themselves for wages, nor for the renting of the wife's land; and it should not be inferred from the want of an agreement of this nature, which cannot be enforced, that the wife consented that her husband should be the owner of the produce of the land.

In the *Matter of McMaster*, 12 N. Y. C. P. 177, it was held that the husband has not the legal capacity to be the surety of his wife on an undertaking on appeal from a surrogate's decree.

Actions.—Neither the act of 1848 nor that of 1849, contains any provision relating to the bringing of suit by married women. *Alward v. Alward*, Supm. Ct., Special Term, 1888. The extent to which the legislature designed to evade the common law rule by these acts was simply to confer upon married women the right to take, hold and convey their separate estate in the same manner as though unmarried. *Id.*

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By the act of 1860, as amended by the laws of 1862, the additional right and liability to sue and be sued in all matters having relation to her sole and separate property in the same manner as though she was sole, was conferred upon her. The court of appeals held, in *White v. Wager*, 25 N. Y. 328, that this language did not enable her to convey directly to her husband, and this decision has been acquiesced in down to 1887, when it was abrogated by express enactment. Chapter 537, of the Laws of 1887. If it required specific action on the part of the legislature to enable husband and wife to convey directly to each other, it would require similar action to authorize them to sue each other. The amendment of 1862 was repealed by chapter 245 of the laws of 1880, and in lieu thereof we now have only § 450 of the Code, which provides that "in an action or special proceeding, a married woman appears, prosecutes or defends, alone or joined with other parties, as if she was single." There is nothing in this language which can be construed to confer upon husband and wife the right to maintain a legal action against each other. *Alward v. Alward*, *ante*.

These several acts were designed for the protection of the wife and to confer upon her certain rights and privileges. It would be an unwarranted perversion of their design to hold that they confer upon the husband a privilege which was not afforded him by the common law. This was the view taken in *Perkins v. Perkins*, *ante*, as well as in *White v. Wager*, *ante*. The sound and sensible rule, which obtained at common law relating to the unity of husband and wife, has not yet been so far abrogated as to confer upon them the much coveted privilege of bringing their quarrels into a court of law. *Alward v. Alward*, *ante*.

But courts of equity will, in furtherance of the manifest intentions and objects of the parties, carry into effect a contract entered into between husband and wife, though it would be void at law; and, in order to accomplish this, it will entertain a suit at the instance of either against the other party. *Id.*; *Shepard v. Shepard*, *ante*; *Hunt v. Johnson*, *ante*.

In the case of *Wright v. Wright*, 54 N. Y. 437, the commission of appeals held that a wife might maintain an action against her husband upon a promissory note, and that it mattered not in what form she brought her action.

In *Wood v. Wood*, *ante*, it was held that a wife might maintain ejectment against her husband.

In *Howland v. Howland*, 20 Hun, 472, it was held that she might likewise maintain replevin.

In *Berdell v. Parkhurst*, 19 Hun, 358, it was held that the husband might sue his wife for conversion.

In *Granger v. Granger*, 41 Hun, 638, it was held that a husband and wife might contract with each other, and that an action at law could be maintained upon a promissory note given by the latter to the former.

The general term in *Schultz v. Schultz*, 27 Hun, 26, held that a married woman might sue her husband in a civil action for assault and battery;

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but this case on appeal to the court of appeals was reversed. The decision in this case at general term is in direct conflict with those of *Freethy v. Freethy*, 42 Barb. 411, and *Longendyke v. Longendyke*, 44 Barb. 366, and was placed upon the ground that the acts of 1848, 1849, 1860, and 1862, had not only destroyed the unity of husband and wife, but had expressly conferred upon them the right to sue each other in any form of action. A reversal of this case by the court of appeals is reported in 89 N. Y. 644, and, although no opinion was written, the ground upon which the reversal is granted is made quite obvious by the reference thereto which occurs in the case of *Bertles v. Nunan*, *ante*, in which the court says: "Although § 7 of the act of 1860 authorizes a married woman to maintain an action against any person for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury." No distinction is made in the section referred to, between an action for a personal injury and any other of a strictly legal nature; and, if a wife may not bring suit for assault and battery, it is difficult to see upon what principle she may bring an action for either conversion, replevin, ejectment or to recover the amount due on a promissory note.

At common law, the husband was entitled to all the personal property and choses in action of the wife, even when the property was received from her father's estate prior to the act of 1848. *Woodworth v. Sweet*, *ante*; *Ryder v. Hulse*, 24 Id. 372.

But it is well settled that a court of equity will make a settlement to the support of the wife out of any property received by the husband in her right. He might allow the wife to retain her separate estate, and, if he borrowed her money, there was a valid consideration in equity to repay it. A promise to repay money so borrowed by the husband cannot be regarded as a *nudum pactum*. *Woodworth v. Sweet*, *ante*; *Babcock v. Eckler*, *ante*; *Buckley v. Wells*, *ante*; *Savage v. O'Neil*, *ante*.

It seems unreasonable to subject the property of the husband to liability, in causes of action induced and arising from the separate acts of the wife herself, when the husband in no way joins, and as to which he cannot control the wife. *Trebing v. Better*, 12 Abb. N. C. 312, note. As § 450 of the Code existed in 1877, the provisions were broad and general, and applied to all causes of action and proceedings affecting a married woman, whether plaintiff or defendant; and the amendment of 1879 does not limit in terms the existing provisions. *Id.* In this case it was held to be the legislative sense that a married woman should be regarded as a single female; but, that there might not be even a doubt suggested that her independence was not thorough and complete, the amendment was framed so that it should be understood that the joining of the husband with the wife was not only unnecessary but also improper.

It has been decided that a wife may not sue her husband for slander, nor for assault and battery, nor for wages. *Berdell v. Parkhurst*, *ante*; *Freethy v. Freethy*, *ante*; *Longendyke v. Longendyke*, *ante*; *Perkins v. Perkins*, 62

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Id. 530; *Shuttleworth v. Winter*, 55 N. Y. 625. The court of appeals held that a wife did not become liable to answer her husband's administrators for the proceeds of property disposed of by the wife without right, in the lifetime of her husband, when the property was intrusted to her, by the husband, for management and control. But on the other hand, it has been held that a wife could sue the husband for a conversion of her property. Though there is some question whether an action at law could be brought in such case, there is no doubt that a complaint which stated a conversion stated a cause of action, and that the proper relief should be given, even though it was not asked for in the complaint. *Whitney v. Whitney*, 3 Abb. N. S. 350. So it has been held that the wife may sue her husband in ejectment to recover the possession of her property, which was wrongfully detained from her by her husband. *Berdell v. Parkhurst*, *ante*. In this case it was held that a husband may maintain an action at law against his wife to recover personal property, belonging to him, which has been forcibly seized and carried away by her, under a claim that it belonged to her and not to her husband.

An action by a wife may be maintained against her husband for the conversion of her property. So she may maintain ejectment against her husband for her real estate. *Minier v. Minier*, 4 Lans. 421; *Wood v. Wood*, 18 Hun, 350. In *Berdell v. Parkhurst*, *ante*, same case under the name of *Berdell v. Berdell*, 68 How. 102, it was held that the husband may sue his wife for taking and converting his property; but this was an extreme case. If the husband may sue his wife in such case, she would be entitled in like case to an action against him; and the weight of authority, and the reason of the Married Woman's acts, sustain her right. *Wright v. Wright*, 54 N. Y. 437; *Perkins v. Perkins*, *ante*; *Whitney v. Whitney*, 3 Abb. N. S. 350; 49 Barb. 319; *Adams v. Curtis*, 4 Lans. 164; *Howland v. Howland*, 20 Hun, 472.

In the latter case, it was held that a wife who has left her husband without good cause, and is living separate and apart from him, may maintain an action of replevin against him to recover articles of personal property belonging to her, which were left and remained in his house and possession.

The wife could maintain a suit against her husband, in equity, for the purpose of obtaining a divorce, or a separation from bed and board; to restrain him from improper use or destruction of her separate property; or to compel him, under proper circumstances, to provide a suitable fund for her maintenance; and in like cases; and such suits, except when otherwise authorized by statute, were to be brought by her next friend; but she could not maintain any action at law against him. *Freethy v. Freethy*, *ante*. In this case it was held that a wife could not maintain an action against her husband to recover damages for slander, and that the legislature did not intend by § 114 of the former Code, nor by § 3 of chapter 172 of the Laws of 1862, to change the common law rule as to the disability of husband and wife to sue each other at law. This section of the former Code did not au-

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thorize a wife to sue her husband in any case where she did not have previously the right to do so. It provided that when the action concerned her separate property, and was brought against any other person than her husband, it was not necessary to join with him in its prosecution ; and if the suit was against him, it might be in her own name alone, without the intervention of a next friend. *Id.* And no authority was given to the husband, by the statute of 1862 or any other act, to sue his wife for any injury to his person or character; and the legislature did not intend to give to the wife any such action. *Id.*

In *Longendyke v. Longendyke*, *ante*, it was held that a married woman could not sue her husband in an action for an assault and battery.

It was held in *Schultz v. Schultz*, 2 N. Y. C. P. 282, that § 7 of chapter 90, Laws of 1860, confers in express terms upon a married woman the right to maintain an action against any person for personal injury, and by implication, if implication is necessary to be invoked, against her husband. And where in an action by a married woman against her husband for assault and battery the acts of the husband were in part criminal assaults, which inflicted serious injuries upon the person of his wife, her cause of action was one of pure injury to the person, and the case one in which the right of arrest is given by the Code. But this case was subsequently reversed in the court of appeals.

Opinion of the Court, by VAN BRUNT, P. J.

BENJAMIN MOORE, Trustee, etc., Respondent, v. FRANCIS HIGGINS, Receiver, etc., Appellants.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Receiver. Rent.*—A receiver of a lessee is not liable for any rent or taxes which had accrued prior to his appointment, but is chargeable with all that have fallen due subsequent to his acceptance of the lease and premises.
2. *Appeal. Objection.*—Though taxes accruing prior to the appointment of the receiver were improperly included in the judgment, the question cannot be considered upon the appeal, where no objection or exception to, or ruling on, this point, has been taken.
3. *Same. What considered.*—Where an appeal is brought from the judgment alone, the court can consider only the questions as to whether there have been errors in the rulings of the court to which proper exceptions were taken.
4. *Trial. Charge.*—Where the requests to charge are improper and incorrect, the court may properly refuse to give the direction sought.

The defendant's testator, prior to his decease, received a lease from the plaintiff of certain lands in the city of New York for a term of twenty-one years. The defendant was sued as the receiver of the lessee.

Appeal from a judgment entered on verdict directed by the court.

Samuel Jones, for appellant.

C. Souther, for respondent.

VAN BRUNT, P. J.—It is not necessary to discuss at large the facts of the case at bar, or the right of the plaintiff to recover, this right having been heretofore adjudicated upon by the general term. 33 Hun, 667.

The only question to be considered is as to the amount of the recovery, and whether any exceptions have been taken

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which raise any question under which the amount may be reduced.

It seems to be clear that the receiver would not be liable for any rent or taxes which had accrued prior to his appointment. It is claimed upon the part of the appellant that he never accepted the lease or the premises until May, 1879.

The allegations of the complaint and the admissions of the answer negative this proposition, in that it is alleged in the complaint that the receiver paid to the plaintiff the rent of the premises to and including September 1st, 1878, thus showing that the receiver had certainly, prior to September, 1878, accepted the lease and the premises, and he is certainly chargeable with the rent and taxes which fell due subsequent to that date, and in view of the general nature of the allegations, and the general nature of the admissions, it would seem that the receiver had, from the time of his appointment, paid the rent which fell due up to the 1st of September, 1878.

There is no claim that the rent was paid by anybody else, and the allegation in the complaint is that he had paid the rent of the premises to and including September 1st, 1878, which is admitted.

The only questions in the case arise upon the requests made to the court to direct a verdict. The first request was that the court direct a verdict for the defendant, which was denied, and defendant excepted. This exception is clearly unavailing.

The defendant's counsel then requested the court to direct that no rent or taxes could be recovered which accrued prior to May 1, 1879, which being denied, an exception was taken. And upon another motion made, the defendant's counsel requested the court to direct that a verdict could not be recovered, except for rent accruing subsequent to March 1, 1879, which motion was denied, and to these several requests exceptions were taken.

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It seems to be reasonably clear that these exceptions raise no questions which will justify the granting of a new trial because it appears, as already stated from the admissions contained in the pleadings, that certainly as early as September, 1878, the receiver claimed the title to this lease, and that he paid the rent thereof, and having thus assumed the ownership of the lease, he became liable for the rent and taxes of the premises.

All the requests refer to the acquiring of title to the lease at a subsequent date, namely, as late as March 1, 1879. If the admissions in the pleadings, and the necessary results arising therefrom, are such as we think they are, these requests were improper and incorrect, in that they precluded the consideration of any rent between the 1st of March, 1879, and the 1st September, 1878, and the learned court was therefore correct in refusing to give the direction asked for.

In view of the fact that the appeal is from the judgment alone, the court can consider only the question as to whether there have been errors in the rulings of the court to which proper exceptions were taken.

Although the judgment seems to be for more than the evidence justified, in that taxes were included in the amount which had accrued prior to the appointment of the receiver, yet there having been no objection taken to this point, and the attention of the court not being called to the fact, and no proper exceptions having been taken to the ruling of the court, it cannot be considered upon this appeal.

The judgment should be affirmed, with costs.

CULLEN, J., concurs.

HENRY M. CRIPPEN, Appellant, v. SARAH A. CRIPPEN,
as Executrix, et al., Respondents.

Supreme Court, Third Department, General Term, July 6, 1889.

1. *Contract. Promise to pay.*—Wherever a promise to pay money out of property, to be received from a decedent's estate, in execution of his request, has been enforced, it has been made by a person who, by descent, devise or bequest, has received from the decedent property out of which the proposed devise or legacy would have come, and has prevented the making of such proposed devise or legacy; the mere proof that the promise to pay has been made is not sufficient to justify a recovery.
2. *Same.*—In order to sustain a claim that a husband has obtained title to his wife's property by reason of a promise to her that her money should go to her children after her death, without a will, it must be shown that he, by virtue of such promise, obtained from his wife's estate money which she otherwise would have given to them.
3. *Same.*—Where the personal property of a wife came to her from her father in 1845, and there was no evidence that her husband had not reduced it to possession, or held it in trust for her, there is not sufficient proof to show that he obtained any property from her by his promise that would otherwise have gone to her children, and a claim of her son against the estate of the husband was properly rejected.

See note at end of case.

N. C. Moak, for appellant.

T. F. Hamilton, for respondents.

LEARNED, P. J.—Riley Crippen died December 30, 1885, leaving a will which was duly proved, and defendants were appointed executrix and executor.

The plaintiff, a son of deceased, presented a claim which was duly referred under the statute. The referee reported in favor of the claim. The defendants on case and exceptions moved to set the report aside. The motion was granted and plaintiff appeals.

Opinion of the Court, by LEARNED, P. J.

The claim is on an alleged oral promise made by Riley Crippen to his wife, Fanny, about July, 1853.

The facts out of which the alleged promise arose are as follows :

Ephraim Wheeler died in 1840, and left surviving children, among them Fanny. There is some testimony that each daughter received about \$4,000 from his estate. This is only given on recollection of witnesses, and a statement of Riley Crippen said to have been made about 1854.

Fanny Wheeler in 1845 married Riley Crippen. She died in July, 1853. There is the testimony of two or three witnesses as to statements made by him at or before her death; being about thirty years of age. These statements are in substance that when she was ill and near death she proposed to make a will, and that he told her there was no need of a written will, as everything could be carried out as she wished, and the wish was that he should have the use during his lifetime and then this money, said to be \$3,900 should go to her children.

The plaintiff is one of the three children of Fanny. One other child is living who is the plaintiff in another action, and the third child is dead, leaving children.

The learned justice who decided the motion thought that the evidence was insufficient to show that Fanny Crippen had money which came from her father; that the money came to the hands of her husband, or that he made the alleged promise. He pointed out very justly that the only evidence consisted of testimony to verbal admissions, made about thirty-three years before the death of the testator, and we think that his remarks are just. It is not shown what property was received from Ephraim Wheeler's estate, nor what were the terms of his will, if, as defendant's brief states, he left a will.

If he died in 1840, then Fanny, so far as appears, became entitled to the property. When she married Riley Crippen, in 1845, her personal property became his. There is no

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evidence that it had not been reduced into possession, or that he was holding it in trust for her. Therefore, when she died, in 1853, she had no personal property to dispose of. At least none is shown.

As was stated by this court in *Bull v. Bull* (31 Hun, 69), "the promise which has been enforced has been made by a person who, by descent or devise or bequest, has received from the decedent property out of which the proposed devise or legacy would have come, which proposed devise or legacy was prevented by the promise of the person thus held liable." This is the principle which has controlled the case. *O'Hara Will*, 95 N. Y. 403.

Certainly a promise, where the promisor owns the property and the promisee does not, can create no legal obligation. It is the wrong done to the promisee, by preventing him from doing what he would otherwise have done with his own property, which makes this kind of promise binding.

To sustain this report of the referee, then, it must be shown that Riley Crippen, by virtue of the alleged promise, obtained from his wife's estate after her death the title of this money, which would otherwise have been given by her to her children. Unless this be shown, then her will, if executed, would have been of no avail to them.

We agree with the learned justice that this has not been shown; and we think that the order should be affirmed with costs. The same disposition is made of the case of *Emily Wood* against the same defendants.

NOTE ON PROMISE BY ONE TO ANOTHER FOR THE BENEFIT OF A THIRD PERSON.

This principle is found laid down among the earliest reported decisions of this state; but has had a hard struggle to maintain its existence. It was denied and disputed until the court of appeals in *Lawrence v. Fox*, established it upon a firm foundation, from which it has not since been removed, though it has been defined, refined and narrowed down until its application has become greatly limited.

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The party claiming the benefit of the promise must have a legal claim against the promisee which will be a substitute for privity with the promisor. This claim may be based upon a valuable consideration or moral obligation.

The rights and obligations under such agreements are limited to the contracting parties, unless it was entered into, in whole or part, for the benefit of the person or persons, claiming to come in under its stipulations. Proper care must be used by the court for the purpose of determining whether or not the immediate persons to the contract intended that a third person should derive a benefit and advantage from the promise, and thus secure a right to enforce it by an action in his own name.

There must be an existing claim against the promisee in favor of the third person, and an engagement by the promiser to discharge his own liability to the promisee by the payment or satisfaction of such claim, in order to render the promise enforceable by the third person. This existing claim may consist of money or property placed in the promiser's hands at the time, but whether it may consist of a past indebtedness depends upon the fact of a new consideration, arising from the fact of release or satisfaction of such debt.

It is not sufficient to entitle the third person to maintain an action, that he may be benefited by the performance of the promise; but, as he is neither privy to the contract nor to the consideration, the agreement must be made for his benefit for its object, and he must be the party intended to be benefited.

Where a grantee assumes an existing mortgage as part of the consideration for the conveyance, and the amount of the mortgage is deducted from the purchase price and left in his hands for the purpose of paying such incumbrance, he is personally liable to the mortgagee to pay the same, in case his grantor was so liable to the holder. But in case his grantor was under no personal obligation to pay the mortgage, the mortgagee cannot maintain an action upon the assumption clause.

An agreement to assume the payment of an existing mortgage when contained, not in an absolute conveyance, but in a mortgage, or in a conveyance, which in equity, amounts only to a mortgage, does not impose upon the second mortgagee, making such an agreement an absolute, continuing personal liability, which can be enforced by the second mortgagee.

A person, not a party to the promise, but for whose benefit the promise was made, cannot maintain an action to enforce the promise, where it is void between the promiser and the promisee, for fraud, or want or failure of consideration.

Where a party purchases the goods of a firm, or one partner, the interest of his copartner, upon an agreement to pay the firm creditors, the right of a creditor to enforce the promise for his own benefit, depends upon the fact whether the agreement was made for the benefit of the creditors or a certain class of them, or for the benefit of the promisee only; or whether

Note on Promise by One to Another for the Benefit of a Third Person.

the creditors are sufficiently identified as belonging to the class, who were to be paid, or no class is named or described to be paid by the promiser, or the extent is left absolutely uncertain and undetermined.

Where a person who, by descent, devise or bequest, has received from a decedent, property, out of which he promised to pay an amount in accordance with the decedent's wish, it must be shown, in order to recover upon such promise, that he has received the property; the mere proof of such promise is not sufficient to justify a recovery.

The right of the third party, before he has accepted and adopted the promise, is subject to the relations and equities of the original promiser and promisee, and the destruction of the consideration on the one hand and the rescission and annulment of the contract on the other, bar and prevent him from any right of action upon the promise. An acceptance or adoption of the promise on his part, by word or act, is essential.

Such a contract, however, is not revocable by the promisee after it comes to the knowledge of the third person, and he has assented to it, and a release is wholly ineffectual to destroy his right of action. Such release may discharge the liability of the promiser to the promisee. The state decisions sustaining these propositions follow.

When action maintainable.—In *Schermerhorn v. Vanderheyden*, 1 Johns, 139, the facts were that, in consideration of an assignment of certain personal property by plaintiff's wife's father to the defendant, the latter promised to purchase for plaintiff's wife a cherry desk. He failed to do so, and for that breach the action was brought by the plaintiff, suing in his wife's right. It was objected that no action could be maintained by the plaintiff on the promise made to his wife's father; but the court held otherwise remarking that, where one person makes a promise to another for the benefit of a third person, the latter may maintain an action on such promise, citing *Dutton v. Poole*, 2 Levinz, 210, and saying that the same principle has since that time been repeatedly sanctioned by the decisions of the English courts.

While a different rule is said to prevail in those tribunals at the present time, and there even in equity the doctrine of the earlier cases may be considered as unsettled, the courts in this state have uniformly adhered to this principle. In 1817, it seems to have been approved by Chancellor Kent, in *Cumberland v. Codrington*, 3 Johns. Ch. 254. The question came directly before him in 1823, and he held that where a father conveyed land to his son on the latter's covenanting to pay an annuity to his mother during her widowhood, she might maintain an action on the covenant so made for her benefit. *Shepard v. Shepard*, 7 Id. 56; and in 1845, his successor says it has been the settled law from that time of the decision of the case of *Dutton v. Poole*, *ante*, down to the then present time, that a party for whose benefit a promise is made may sue in assumpsit upon such promise though the consideration for such promise moved between the promiser and a third person.

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Such was also the conclusion of the late supreme court of this state, after a full examination of the authorities, in *Barker v. Bucklin*, 2 Denio, 45. It was also held by the present supreme court in 1859, in *Judson v. Gray*, affirmed by the court of appeals in 17 How. 289.

In *Farley v. Cleaveland*, 4 Cow. 432 ; 9 Id. 639, one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley ; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery.

In *Barker v. Bucklin*, 2 Denio, 45, a party, who was indebted to the plaintiff, sold property to the defendant who agreed to pay the price of it to the plaintiff, on account of the latter's demand against the seller, and it was held that the plaintiff might maintain an action on such promise against the defendant.

In the *D. & H. C. Co. v. The Wheschester Co. Bank*, 4 Denio, 97, a firm who were indebted to the plaintiffs, placed a bill of exchange in the hands of the defendant for collection, who, upon consideration thereof, undertook to collect it, and to pay the amount, when collected, to the plaintiffs in satisfaction of their debt against the said firm, and the defendant collected the bill of exchange. In an action by plaintiff against defendant upon such agreement, it was held that they could maintain an action against it on that promise.

As long ago as 1817, chancellor Kent laid this principle down as a point decided, and referred to not less than eight English and American cases as sustaining it. *Cumberland v. Codrington*, *ante*. Since then it has been frequently affirmed by judges, after an attentive examination of cases, as in *Barker v. Bucklin*, *ante*, and in the cases therein cited. Some of the opinions in these cases were pure *obiter dicta* and in others, the cases though presenting the point were decided upon other grounds. It could not however be denied, that the doctrine had been so often asserted, that it had become the prevailing opinion of the profession, that an action would lie in such a case in the name of the creditor, for whose benefit the promise was made. Finally the question came squarely before the court of appeals in *Lawrence v. Fox*, 20 N. Y. 268, and it held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. The precise point decided in this case has been regarded since as definitely settled, so far as the courts of this state are concerned.

Where one person makes, upon a valid consideration, a promise to another for the benefit of a third person, the latter may maintain an action upon it, although not privy to the consideration. *Lawrence v. Fox*, *ante*. In this case, a party, at the request of defendant, loaned him some money, upon his promise to pay it to the lender's creditor, who brought an action

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upon such verbal promise and recovered, without proof that the lender was indebted to him.

The later cases limiting *Lawrence v. Fox*, seem to require, as a condition of maintaining the action, that the party claiming the benefit of the performance shall have a legal claim against the promisee which will be a substitute for privity with the promisor. *Litchfield v. Flint*, 22 W. Dig. 286.

In the same case on appeal to the court of appeals, the rule laid down in *Vrooman v. Turner*, 69 N. Y. 280, that a legal obligation or duty of the promisee to the third party will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing proof of the intent of the latter to benefit him, and creating a privity by substitution with the promiser, was applied in the case of the promise to pay a note made to one who is liable thereon as indorser. 104 N. Y. 543. In such case even though the promiser is not liable to the holder of the note, yet, if the indorser has become the owner thereof by transfer from the holder subsequent to the promise, he may enforce such promise as a party to it, as he holds, not only all rights which the owner of the note had under the promise, but all the rights which he had as a party thereto.

The case of *Lawrence v. Fox*, *ante*, has been the cause of many experiments in the courts, and productive of an abundant and odd lot of law suits. It has been explained, criticised, limited and questioned but never overruled. Thirty years have elapsed since it was decided, yet the principle upon which it rests is still a matter of uncertainty and dispute. It has been followed as a controlling authority in all cases presenting similar facts, but the doctrine of the case was established with difficulty, has been yielded to with reluctance, and the courts have steadily refused to extend its application to new cases. All that this case decides is, that where one person loans money to another upon his promise to pay it to a third party to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money. *Lorillard v. Clyde*, 56 Super Ct. 14; *Garnsey v. Rogers*, 47 N. Y. 240.

A right of action does not accrue to a third party, because a promise has been made by one to another for his benefit.

The prevailing opinion in the case of *Lawrence v. Fox*, *ante*, rested the creditor's right upon the broad proposition that the promise was made for his benefit, and therefore he might sue upon it, though privy neither to the contract nor its consideration. Two of the judges who concurred in this decision stood upon a different proposition. They held that the promisee accepted the promiser's covenant, as agent of the third person, who might ratify the act with the same effect as though he had originally authorized it.

But another basis for the action has been asserted, applicable, however,

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only to cases where the grantee has assumed the mortgage and, on its foreclosure, the mortgagee seeks a judgment for deficiency against the grantee. In *Burr v. Beers*, 24 N. Y. 178, and again in *Garnsey v. Rogers*, *ante*, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation and had been recognized and enforced long before *Lawrence v. Fox* was decided. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might in equity be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in *Halsey v. Reed*, 9 Paige, 446, and the right of the mortgagee was put upon the equity of the statute. This proposition was all very well so long as there was supposed to be no equivalent remedy at law, but, after the decision of *Lawrence v. Fox*, the latter remedy existed, and in *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case.

A fourth suggestion respecting the basis of these rights of action appears in the opinion of Andrews, J., rendered when the case of *Gifford v. Corrigan* was before the court of appeals the first time. 117 N. Y. 257. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" On a subsequent appeal of this case to the court of appeals, the court says: "If we discard the fictitious theory of an agency, what remains is the equitable right of subrogation swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor. It is no new thing for the law to borrow weapons from the arsenal of equity."

In *Judson v. Gray*, 17 How. 390, the defendant, who was the attorney for the party to a suit, requested his client to give him a promissory note for the amount of the fees due the plaintiff as referee in the case, under an agreement that he would thereupon pay the plaintiff his fees, and the note was accordingly given. The court allowed a recovery, but announced no new doctrine; it, in the opinion, stated that, as the agreement in question was made for the benefit of the plaintiff on a sufficient consideration, and had been adopted by him, he can maintain an action against the defendant upon such agreement; that it is not necessary that the money should actually come into the defendant's hands to render him liable, but any property which he may receive is a good consideration for his agreement to pay; that the note was a valid security in the hands of the defendant, and a good and sufficient consideration for his promise to pay his client's debt to the plaintiff.

In *Mittenbeyer v. Atwood*, 18 How. 330, the complaint alleged that, on an accounting had between the drawers and drawees, there was left in the hands of the drawees, sufficient money to pay a certain draft, and

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which the drawees then agreed to pay to the holder, but subsequently refused to accept. In an action on said draft by the holder against the drawees, the promise was held to be valid, and a sufficient foundation for an action by the person for whose benefit the promise was made.

In *Secor v. Law*, 4 Abb. Ct. Ap. Dec. 188, it was held that, where the associates of defendant paid him their respective shares of a certain demand, and he agreed with them to pay and satisfy the holders therefor, this rendered him individually liable to the holders upon such demand, irrespective of the question whether he was solely liable upon the contract.

In *Seaman v. Hasbrouck*, 35 Barb. 151, it was held that a parol promise of a party, to whom a conveyance of lands is made for the purpose of paying, in addition to certain debts owing by the grantor to such party, certain debts of the grantor owing to third persons, was valid and obligatory upon the promisor, without the concurrence or consent of the creditors being given to the arrangement, and without any suspension or extinguishment of the claim of those creditors, as against the original debtor.

The purchase money may be regarded as a fund intended directly for the benefit of the specified creditors of the grantor who have such an interest in the appropriation of the fund in question that they can bring an action in their own names to recover their debts of the defendant, whether they knew of this arrangement at the time, or subsequently assented to it, or required it to be done at some future period.

Where a father has conveyed land to his son upon the latter's orally agreeing, in consideration of the conveyance, to pay his indebtedness, his creditors were permitted, in *Kingsbury v. Earle*, 27 Hun, 141, to maintain actions against the son to recover their debts. In such case the right of action is not limited in its extent by the consideration actually received by the defendants; nor is it of any importance whether or not such an agreement is in writing. It was a promise to pay one's own debt, and if there was a good consideration, the promise was binding to its full extent.

In *Barker v. Bradley*, 42 N. Y. 316, a party agreed to pay the plaintiff \$2,000 for his interest in the property of a company and subsequently the defendant's testator, upon a consideration passing between him and the purchaser, promised to pay the \$2,000 to the plaintiff. It was held upon the authority of *Barker v. Bucklin*, *ante*; *Lawrence v. Fox*, *ante*; and *Judson v. Gray*, *ante*, that a verbal promise to pay the debt of a third person to the plaintiff, made by the defendant upon good consideration moving from such person, will support an action by the plaintiff against the defendant, although the former was not a party to the agreement and it was made without his knowledge.

In *Coster v. The Mayor of Albany*, 43 N. Y. 399, an agreement was made by the city of Albany, under its corporate seal, with the state, for the protection and indemnity of the state, and the payment of all damages caused to property, and by it the city, in consideration that the state would do

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certain work, and in view of the certain result, that damage must be done to property in the doing of it, assumed all liability therefor, and promised that it would pay such damage. In an action by a property owner who has suffered damage in the performance of such work, it was held that he could enforce the promise against the city in his own name, and that the promise was made to the state, for the benefit of any third person, to whose property damage was caused.

In *Hutchings v. Miner*, 46 N. Y. 456, a policy of insurance upon the life of one was made payable to and held by another person, but was so held, in whole or in part, for the benefit of the insured, or of whomsoever he shall designate; and it was held that, if the insured suffers it to remain in the possession of the holder, upon his promising to pay a debt of the insured out of the avails of the policy when collected, this was a valid consideration for the promise, and the creditor, for whose benefit it was made, though having no knowledge of it at the time, can affirm and force it.

In *Pulver v. Skinner*, 42 Hun, 322, a grantee, in consideration of the conveyance to him of certain real and personal property, assumed and agreed to pay certain indebtedness, and to save him harmless therefrom. The grantee died, and his administrator entered into an agreement with defendant, as executor, to convey, or cause to be conveyed, the said property to defendant, and defendant was to pay such indebtedness. Subsequently the widow and all the heirs of the deceased grantee, except a minor, conveyed the real estate to the defendant, as such executor, in consideration of \$11,000; and in consideration of this conveyance, defendant executed to said administrator, as attorney in fact for the widow and heirs, a bond, reciting the existence of the claim against the estate, and conditioned that the obligor should pay, or cause to be paid, the aforesaid claim and save the said estate harmless, and within four months deliver receipts for such payments to the obligee; and by the bond he further agreed to and with the owners of said claims to pay all that is justly due them, not exceeding the said amounts. In an action by the creditors of the former grantor against the defendant, it was held that they could maintain an action against him, upon the bond, to recover the amount of said claims.

The intent of the promisee was to secure a benefit to these creditors and there was a privity between them, and an obligation or duty owing from the promisee; though there was not a personal obligation on the widow and heirs to pay the debt, there was some obligation or duty resting on the administrator and on the heirs in respect to the creditors, as it was the duty of the administrator, in default of sufficient personal property, to cause the real estate to be applied to the debts.

The authorities bearing upon the right of one party to avail himself of an agreement entered into exclusively between others were collected and considered in *Edick v. Green*, 38 Hun, 202, and the result was declared to be that the rights and obligations under the agreement should be limited to the contracting parties, unless it appeared to have been entered into, in

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whole or in part, for the benefit of the person, or persons, claiming to come in under its stipulations. *Attorney-General v. Cont. Life Ins. Co.*, 43 Hun, 639. This was also held to be the rule in *Simson v. Brown*, 68 N. Y. 355.

In *Attorney-General v. Cont. Life Ins. Co.*, *ante*, it was held that, where by the terms of an agreement one company assumes the liabilities of another, on condition that the parties having claims against the latter company, which claims constitute the assumed liabilities, perform certain acts, the performance of these acts is necessary before the claimants can obtain the benefit of the original agreement.

In *Sackett v. Sackett*, Supr. Ct. Sp. T. October, 1887, the defendant, in consideration of being allowed to purchase the premises at the sale for the sum which he paid therefor, promised and agreed with his father, before and at the time of the sale, that he might remain in the possession and use of the premises during his life, free from rent, and at his death he would pay to each of his three sisters one third the value of the premises after deducting therefrom the amount paid by him for the premises on the foreclosure sale. After the father's death one of the sisters commenced an action on the defendant's promise made to her father, and it was held that she could maintain the action. The court said that the law is now well settled in this state that, upon the facts of this case, an action may be supported in the name of the person intended to be benefited by the promise. The cases bearing on the subject affirm the principle that, where one person makes a promise to another for the benefit of a third person, the latter may maintain an action thereon. In applying this principle of law to particular cases, proper care must be used by the court for the purpose of determining whether or not the immediate parties to the contract intended that a third person should derive a benefit and advantage from the promise, and thus secure a right to enforce the same by an action at law in his own name. *Id.* *Barker v. Bucklin*, *ante*; *Lawrence v. Fox*, *ante*; *Burr v. Beers*, *ante*; *Pardee v. Treat*, *ante*; *Todd v. Weber*, 95 Id. 181-194; *Farley v. Cleveland*, *ante*.

There must be some obligation or duty owing from the promisee to the third party, which will give the latter a legal or equitable claim to the benefit of the promise, or an equivalent from the promisee personally. *Lorillard v. Clyde*, *ante*.

In *Vrooman v. Turner*, *ante*, the court said that in every case in which an action has been sustained, there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, or upon the doctrine of a trust, there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.

The benefit to the promisee, however, is not the basis upon which any of these cases rest. It is the promise made for the benefit of the third party that the courts enforce, and the privity between him and the prom-

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isee which the law requires, is that which arises from some debt or duty, due from the latter to the former, which the promisor engages to discharge. In other words, there must be, first, an existing claim against the promisee in favor of a third party, and, second, an engagement by the promisor to discharge his own liability to the promisee by the payment or satisfaction of such claim. In the absence of either of these conditions, the doctrine of *Lawrence v. Fox*, has no application. *Lorillard v. Clyde, ante*.

In *Cooley v. Howe Machine Co.*, 53 N. Y. 620, an assignor being indebted to defendant sold and assigned to it certain personal property to apply in payment and transferred other property as collateral security for the payment of the balance of the indebtedness, and to pay certain other debts of the assignor set forth in a schedule annexed to the assignment, not exceeding the amount therein specified. In the schedule was set out a note to plaintiff. In an action to recover the amount of the note, it was held that the assignment was a fixed arrangement for plaintiff's benefit, which could not be changed without payment of plaintiff's debt, and that the action was maintainable.

In the supreme court of the United States, *Hendrick v. Lindsay*, 93 U. S. Rep. 143, it is said that the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, though much controverted, is now the prevailing rule in this country.

Within the principles of adjudged cases in the court of appeals, where the plaintiff seeks to base his right to maintain an action against a third party upon a contract made between that party and another, it must be one made or intended for his benefit. Such a beneficial intent must be clearly found in the agreement. *Beveridge v. N. Y. E. R. Co.*, 112 N. Y. 1. In all of the cases where an action has been sustained upon such promise, the facts showed that the promise clearly was for the third person's benefit, and made with that distinct intention. *Id. Wheat v. Rice*, 97 N. Y. 296; *Vrooman v. Turner, ante*; *Borlow v. Myers*, 64 Id. 43; *Lawrence v. Fox, ante*.

When not maintainable.—The case of *Seaman v. Whitney*, 24 Wend. 260, has occasionally been referred to, but not by the courts, not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in *Schermerhorn v. Vanderheyden*. In that case one Hill made his note and procured it to be indorsed by Seaman and discounted by the Phoenix Bank. Before the note matured and while it was owned by the Phoenix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and subsequently got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover:

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first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phoenix Bank, who then owned the note; and although, in the course of the opinion of the court, it was stated that, in all cases where this principle was sought to be applied, the fund had been appropriated by an express undertaking of the defendant with the creditor, yet, before concluding the opinion of the court, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor.

In *Hoffman v. Schwabe*, 33 Barb. 194, a vendee assigned a contract for the sale of land, for which the assignee gave his two promissory notes payable one year from date, with interest. The notes were signed by the plaintiff, as surety for the assignee; subsequently the assignee assigned the same contract to defendant, who made an agreement with him in part consideration thereof, to pay the notes which had been given to the former assignor by the assignee. The surety, having paid the notes, brought an action against the defendant to recover the amount so paid, and it was held that although, under the facts of the case, the agreement of the defendant to pay the notes, was a valid one, yet there was no privity between him and the plaintiff, which would sustain an action by the latter.

In this case, the assignee, when the promise was made, did not owe the plaintiff, and the plaintiff had no right of action against any one, and could have none, till he had paid the notes upon which he was surety for the assignee; and though it would have been benefited had plaintiff fulfilled his agreement with the assignee, there is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for the benefit of a third party; and the promise of the defendant belongs to the former class. The courts have not yet held that an action on such a promise can be maintained by the person who would be benefited by its fulfillment.

Where an assignee, in the assignment of a contract, assumes debts incurred by his assignor in its performance, to the extent of a specified sum, and no more, and pays more than the amount specified, it was held, in *Odell v. Muley*, 9 Daly, 381, that the remaining creditors have no recourse against him.

In *Wise v. Morgan*, 13 Daly. 402, the defendant, with others, upon the consolidation of two insurance companies guaranteed that the contract obligations of one of the companies with its policy holders would be rigorously fulfilled to the same extent and in the same manner as though the consolidation had not taken place, and it was held that this was not to be construed as guaranteeing the payment of all the policies theretofore issued by such company, and did not, within the doctrine of *Lawrence v. Fox*, ante, entitle a policy holder therein, upon the subsequent insolvency of the com-

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pany, to maintain an action against the defendant for the amount of his policy

The elementary writers agree that, in general, persons who are not parties to a contract have no concern with it. The exception to the rule, as stated, seems to be that an action of assumpsit for money had and received will lie, whenever the defendant has in his hands money which in equity and good conscience belongs to the plaintiff. Cases of relationship also formed an exception, but have ceased to be such. *Meyer v. Stitz*, City Ct. N. Y., March 24, 1890.

In this case a party promised plaintiffs that if they would release their claim against defendant he would lift the balance of the account. Plaintiffs assented to this, but no release was executed, and it was held that it was no record, release or extinguishment of the debt, and that plaintiffs could not maintain an action on the promise.

In *McCafferty v. Decker*, 12 Hun, 455. the defendant contracted with a railroad company to build its road, and agreed that, in all cases of non-payment of laborers by him the company might pay and deduct the same from the amount due him. He subsequently sublet a portion of the work to subcontractors who assigned the subcontract to another party who absconded without paying the amount due to his laborers. Plaintiff had sold goods to the laborers on credit. After the assignee absconded, the defendant paid the laborers the amount due for wages, less what was due to the plaintiff, and the laborers agreed to this deduction provided the defendant would pay it to the plaintiff. In an action brought by the plaintiff to recover the amount so deducted, it was held that, even though there was a promise by the defendant to pay the money to the plaintiff, the same could not be enforced, as there was no consideration therefor, for the reason that the defendant did not owe the workmen, and no liability on his part had arisen under his contract with the railroad company. To give a third party, who may derive a benefit from the performance of the promise, a right of action, there must be a sufficient consideration passing between the promise and his immediate promisee, and then the third person must adopt the promise and then bring himself into privity with the promisor. If there is no consideration, the promise is void as in all other cases.

In the case of *McCafferty v. Decker*, *ante*, no consideration passed to the defendant for his promise. If he had owed the workmen, and they had left the money which he owed them, or any part of it, in his hands on a promise to pay it to the plaintiff in discharge of their liability to him, the plaintiff could have adopted that promise and maintained his action against the defendant upon the principles of *Lawrence v. Fox*, and kindred cases. But as the defendant did not owe the workmen, the principles of those cases cannot be invoked in the plaintiff's aid.

In *Kelly v. Roberts*, 40 N. Y. 432, the purchaser of a stock of goods promised, in writing under seal, to pay for the same at an agreed price. After

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the sale was complete and the goods delivered, the purchaser agreed with the sellers, to pay a part of the purchase money to certain of their creditors, and by the arrangement was to retain in his hands a sufficient portion of the purchase money for that purpose. Before such payment was made by the purchaser, other creditors of the sellers sued out an attachment against their property, and the purchaser's obligation was seized and levied upon and the sheriff brought an action upon the original promise of the purchaser, as contained in his covenant; and, in the litigation, the question presented was, whether the promise of the purchaser made, prior to the attachment, to pay particular creditors was binding upon him and constituted a defense to the action. And it was held that his promise, not being based upon any consideration, was not valid and obligatory, and the creditors, whose debts he had promised to pay, had no legal claim against him; that his parol promise was simply an executory contract without consideration and was not enforceable, and if the sellers had sued the defendant upon his covenant for the price of the goods, he could not have defended by proof of such prior parol agreement. The court, in the course of its opinion, remarked that had the sellers and the purchaser made it a condition of the sale of the goods of the former to the latter, that the latter should pay a designated part of the purchase price to the creditors whose debts he afterwards agreed to pay, then the case would have fallen within the principle laid down in *Lawrence v. Fox*, that where a promise is made upon a valid consideration to one person for the benefit of another, the latter may maintain an action thereon.

In *Turk v. Ridge*, 41 N. Y. 201, the defendant, in consideration of a conveyance of a farm to him, executed and delivered to the grantor a bond, conditioned that the same should be void, if the defendant should pay a certain promissory note given by the grantor to the plaintiff, and should indemnify and save harmless the said grantor against the note, otherwise to remain in full force and virtue. The plaintiff, after judgment against the grantor on the note and execution thereon returned unsatisfied, brought an action against the defendant, upon the condition of the bond, and it was held that the bond was merely one of indemnity to the grantor to save him harmless from the note, and not a promise to him for the benefit of the plaintiff, and that the plaintiff could not recover.

In *Johnson v. Morgan*, 68 N. Y. 494, a committee of bondholders of a certain railroad company failing to effect a reorganization of the company, and acting for themselves and the owners of the bonds in their hands, entered into a contract with defendant by which they agreed to sell, and he to purchase the bonds of said company at fifty cents on a dollar for the first mortgage land-grant bonds, one third cash, the balance in satisfactory paper. It was also agreed that all the holders of said bonds, who had registered them, should have the option of accepting the same price and terms. In an action upon the contract by plaintiff, who held some of the bonds, but was not one of the parties to the agreement, it was held

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that defendant did not agree to purchase of each bondholder, nor to pay to each the purchase price but to purchase of and pay the said committee; and that through them only could the option given to other bondholders be consummated; and that the case did not come within the principle of *Lawrence v. Fox*, *ante*, and kindred cases.

In *Roe v. Barker*, 82 N. Y. 431, plaintiff contracted to convey certain premises for \$1,350, of which \$300 were paid down, and the balance was agreed to be paid in annual installments. The grantee, reserving his right to redeem, assigned his contract to defendants in payment of two notes, upon the latter's agreeing to pay enough in addition to make the purchase price \$300. In an action brought by plaintiff to recover installments due and unpaid on the contract, it was held that the evidence failed to show an express agreement on the part of defendants to pay the balance to plaintiff; and that there was, therefore, no assumption of the debt, so as to make it a debt of defendants, at least no promise intended for the benefit of plaintiff; and plaintiff was not entitled to recover. The right of redemption was reserved to the grantee by the assignment, and while that remained, the promise, if made, is not absolute, and is plainly intended solely for the benefit of the other party to the contract, and not at all for that of the creditor. That it may result in a benefit to the latter, is not enough to give him an absolute right of action. The cases of *Richard v. Sanderson*, 41 N. Y. 179; *Cooley v. Howe Machine Co.*, *ante*, *Campbell v. Smith*, 71 Id. 26, do not conflict with this rule. In all of them, the covenant to pay was absolute, and the liability fixed, and it was upon that distinct ground that the creditor's right of action was sustained.

In *Seward v. Huntington*, 94 N. Y. 104, three persons who had jointly indorsed the notes of a manufacturing corporation, entered into a written agreement with each other to the effect that, if the corporation should fail to pay said notes at maturity, they would each pay one third of the amount unpaid, and in case of failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should have and recover from the one so failing an amount equal to his aliquot part. It was also provided that, in case of failure of one of the parties to pay his share of the unpaid paper, and which either of the parties shall have paid in whole or in part, then and in that case the trustee named in a mortgage given as security for the performance of said agreement, is empowered, and it shall be his duty, at the request of the parties so having paid, to foreclose the mortgage made by the party so failing to pay. The corporation made default in the payment of certain of the notes, and it appeared that the corporation and the indorsers were insolvent, and that nothing had been paid upon said notes by any of the parties.

In an action brought by the trustee and the holders of said notes to foreclose the mortgage, it was held that the trust imposed no primary liability upon the parties to the agreement; and that this case was not

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within the principle laid down in *Lawrence v. Fox*, *ante*, and *Burr v. Beers*, *ante*, for the reason that the agreement in question was not intended by the parties thereto to operate for the security or benefit of the plaintiffs, who are creditors of the corporation.

In *Fairchild v. Feltman*, 32 Hun, 398, the defendant made a parol promise to his creditor and the plaintiff that he would pay to the latter the sum of \$100 to apply on the amount due from defendant's creditor to plaintiff. Defendant's creditor gave him credit for that sum in an account kept against him. The defendant was not released by his creditor from his indebtedness, nor was the relation of debtor and creditor existing between them in any way changed. In an action by plaintiff against defendant, it was held that there was no sufficient consideration to support the promise of the defendant to pay the plaintiff, and that the latter could not maintain an action thereon.

In the case of *Lawrence v. Fox*, and in all the others of the same class, of which there are many, it will be found on examination that there was a good and valid consideration passing to the promisor at the time of the promise, and that the agreement containing the promise was in the nature of an original agreement between the promisor and the party from whom the consideration moved.

But in the present case, the promise made by the defendant to pay to the plaintiff the debt which he owed his creditor was a mere *nudum pactum*. The promise made by the defendant to his creditor to pay the debt which the latter owed to the plaintiff was also without any consideration to uphold it. At the time the latter promise was made, the relation existing between them was that of debtor and creditor based upon previous and completed transactions. It was nothing more than an executory parol promise without consideration to discharge his creditor's obligation to the plaintiff.

In *The Nat. Bank of Sing Sing v. Chalmers*, 39 Hun, 468, a judgment was entered by confession in favor of a judgment creditor against a firm for \$13,798.74, of which \$11,463.12 were for money due and to become due to the judgment creditor, and \$2,335.62 for liabilities of the debtor firm to other persons which were severally specified in the statement as liabilities assumed. After an execution had been issued on this judgment, and a levy thereunder had been made upon certain articles of personal property, the judgment was set aside on the motion of a junior judgment creditor. Prior to the entry of such judgment the firm had given the judgment creditor a mortgage on all its real and personal property; but on a foreclosure of said mortgage all the property was sold to the judgment creditor. At the time of the confession of the judgment he did not receive any property or anything, nor subsequently under the judgment or by virtue of it. In an action against the judgment creditor by the creditors of the firm whose claims were entered into the confessed judgment, to recover the

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amount of their respective claims, it was held that there was no consideration for an assumption by the judgment creditor of the liabilities specified in the confession of judgment, and that the holders and owners thereof could not maintain actions against him to recover the amount of their respective claims.

The judgment taken by the judgment creditor was, at most, but a security to be enforced as a lien, and was, therefore, like the mortgage in the case of *Garnsey v. Rogers, ante*. In that case, there was a stipulation in the mortgage whereby the mortgagee assumed and agreed to pay a prior mortgage on the premises, and it was held that the stipulation imposed upon the mortgagee no personal liability for the prior mortgage debt which could be enforced against him by the prior incumbrancer.

When this case was on appeal, before the court of appeals, it was held that there was in this case sufficient evidence from which the jury might have found a good consideration for the promise to pay the plaintiff. The court said that, in most of such cases, the promise of the defendant was made to the debtor to pay his debt to his creditor, but in this case the promise was made to the creditor to pay the debt owing by its debtors to it, and the promise was also made to the debtors to pay the debt they owed the creditor. The promise was two-fold, being to the creditor and to the debtors. If the promise had been made only to the debtors upon a sufficient and proper consideration to pay their debt to the creditor, the latter could maintain an action to recover it in its own name. See also *Todd v. Weber*, 95 N. Y. 194; *Barker v. Bucklin, ante*; *Judson v. Gray, ante*.

In *Comley v. Dazain*, 53 N. Y. Super. 516, it was held, where plaintiffs sold and delivered goods to defendant upon his promise to use his efforts to sell them at a suitable price, with the consent and approval of the plaintiffs, and to pay the proceeds of the sale ratably among the creditors of the plaintiffs, that his sale of the goods without plaintiffs' consent created a cause of action in favor of the plaintiffs, but not in favor of such creditors.

This case went upon appeal to the court of appeals, and is found reported in 114 N. Y. 161. This court held that, while the creditors may have been interested in the performance of the contract, they had no beneficial interest in the contract itself, because they were not parties to it, and the sale was to be made, not for their benefit, but for the benefit of the plaintiffs; citing *Simpson v. Brown, ante*; *Brooman v. Turner, ante*. The court says that there is no evidence of any acceptance or adoption of the arrangement by the creditors, and hence they had no legal interest in the promise of the defendant as to distribution. See *Wheat v. Rice, ante*. The direction as to distribution was, therefore, held not to be irrevocable, but at any time before the creditors had changed their position, it could be revoked by the plaintiffs. See *Kelly v. Roberts, ante*.

In *Simpson v. Brown, ante*, a mortgagee assigned to plaintiff a bond and mortgage to secure \$500, and the mortgagor, without notice of the assign-

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ment, paid the bond to the mortgagee, who thereafter executed a bond to the mortgagor in the penal sum of \$1,000, conditioned that if the mortgagee paid to plaintiff the amount of the bond and mortgage and saved the mortgagor harmless therefrom, the bond should be void. Defendant guaranteed the payment of the bond. It was held that an action upon the guarantee by the plaintiff could not be maintained, for the reason that the obligation was not to pay to plaintiff, but to the mortgagor, and the condition was not a promise, but an alternative for the benefit of the obligor, thereby providing a way by which he might be discharged from his obligation. Though it might be said, in a way, that he was benefited by the payment of the bond, yet it is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to the latter who is neither privy to the contract, nor to the consideration, to entitle him to maintain an action. The contract must be made for his benefit as its object, and he must be the party intended to be benefited. *Id.* *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; *Garnsey v. Rogers, ante*; *Merrill v. Green, ante*; *Turk v. Ridge, ante*.

An agreement by the organizers of a corporation intended to operate an existing railroad then under foreclosure, to assume the conduct and prosecution of a suit with a third person involving the right to a portion of the property and to abide its result, and indemnify the parties to the agreement against the same, was held, in *Vilas v. Page*, 106 N. Y. 439, not to create a cause of action in favor of such third person after the establishment of his claim. There was no promise to pay him the amount of his claim; nor was the promise to abide the result of the litigation or to indemnify the vendors in the contract, made for his benefit, or within *Lawrence v. Fox*, and kindred cases.

When a party agrees to pay another a sum of money, when the consideration is rent received from a third person, the contract inures to the benefit of the promisee, who can maintain an action thereon for the recovery of what is so agreed to be paid. To bring a case within this principle, there must be an agreement to pay to such party. But in *Davis v. Morris*, 38 N. Y. 569, there was nothing but an agreement between the parties determining what application shall be made of a sum of money belonging to them, and although they agree that the rent in question shall be paid out of this money, no right of action against both or either of the parties accrued to the lessor upon the agreement.

In mortgaged cases.—In *King v. Whitely*, 10 Paige, 465, the grantor of an equity of redemption in mortgaged premises, who was neither legally nor equitably interested in the payment of the bond and mortgage except so far as the latter was a charge upon his interest in the lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as a part of the consideration of such conveyance, and it was held that, as the

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grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to such holder for the deficiency upon a foreclosure and sale of the mortgaged premises.

In this case, the Chancellor distinctly repudiates the idea of any right being acquired by the holder of the mortgage, in case of such an agreement, on the ground that it was a contract made between the grantor and the grantee, for the benefit of the mortgagee, and shows that the principle that if one person makes a promise to another, for the benefit of a third, the latter may maintain an action on the promise, applies only to third persons for whose special benefit the promise was intended, and that the older English cases which support the doctrine rest upon the ground that the person obtaining the promise, and from whom the consideration proceeded, intended it for the benefit of the third person.

The case of *Russell v. Porter*, 87 N. Y. 171, recognizes this ground of liability, and the case of *Trotter v. Hughes*, 12 N. Y. 74, adopts the doctrine of *King v. Whitely*, *supra*; and it was held in the latter case that although the accepting of a deed, containing such a stipulation, from a party personally liable to pay the mortgage, rendered the grantee liable to the mortgagee, yet the assumption of the mortgage, in a deed from a party not liable to pay it, did not make the grantee liable, inasmuch as the only ground of liability was that of equitable subrogation of the creditor to all securities held by the surety of the principal debtor; and the grantor, who was not personally liable for the mortgage debt, did not stand in the situation of surety.

The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is found in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promiser.

It is true there need be no privity between the promiser and the party claiming the benefit of the undertaking, nor is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A mere stranger cannot intervene, and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement. *Vrooman v. Turner*, *ante*.

When the owner of land who has mortgaged it conveys it to another who assumes the payment of the mortgage for and as part of the purchase money, a twofold relation is constituted: with his grantor, to protect him

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from any liability, so that if he is compelled to pay the debt he shall be repaid; and with the mortgagee, that by a species of subrogation, the former may resort to him directly to enforce the payment. The positions of the parties become such that the grantee is the principal debtor, and the grantor a surety.

In *Russell v. Pistor*, 7 N. Y. 173, it is said that it is a general principle that, where the owner of land mortgages it to secure payment of a debt, and afterwards sells the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase money, the latter becomes personally liable for payment of the debt to the holder of the mortgage in the first instance, and if the mortgagor is compelled to pay it, he can recover it from the purchaser of the equity of redemption.

A mortgagee in *Burr v. Beers*, 24 N. Y. 178, was permitted to maintain a personal action against a grantee of the mortgaged premises who has assumed to pay the incumbrance, without foreclosing the mortgage, or joining the mortgagor as defendant. The right of recovery in this case was put upon the broad principle that if one person makes a promise to another, for the benefit of a third person, the latter may maintain an action on the promise.

It is said in *Garnsey v. Rogers*, *ante*, that it is not every promise made by one person to another, from the performance of which a third person would derive a benefit, that gives a right of action to such third person, who is privy neither to the contract nor the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited.

So, also, in *Turk v. Ridge*, *ante*, and in *Merrill v. Green*, 55 Id. 270, third parties, under similar agreements, sought to maintain an action upon engagements by the performance of which they would be benefited, but to which they were not parties, and failed.

In *Cumberland v. Codrington*, *ante*, Chancellor Kent intimated that a special agreement between the purchaser and seller of an equity of redemption by which the amount of the mortgage debt is considered as so much money left in the hands of the purchaser for the use of the mortgagee, would be sufficient ground for a suit at law by the mortgagee.

An agreement to assume the payment of an existing mortgage when contained, not in an absolute conveyance, but in a mortgage, or in a conveyance which, in equity, amounts only to a mortgage, does not impose upon the second mortgagee making such an agreement, an absolute continuing personal liability, which can be enforced by the first against the second mortgagee. An agreement of this character is a mere contract to advance, and not a security in the hands of the grantor as surety, available to the parties in whose favor the prior liens exist, on the ground of equitable subrogation. *Garnsey v. Rogers*, *ante*.

In this case, it was held that a judgment could not be sustained on the

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principles which prevailed prior to the case of *Burr v. Beers*, *ante*, nor on the doctrine of that case.

In *Burr v. Beers*, *ante*, the amount due upon the mortgage was reserved out of the purchase money and left in the hands of the purchaser, upon his agreement with the vendor to apply it to the payment of the mortgage debt. The purchase money was in fact a fund in the hands of the purchaser which he had agreed to apply to the use of the mortgage creditor. In performing this agreement, he would have done nothing more than to pay his own debt in the manner in which he had agreed to pay it.

But in the case of *Garnsey v. Rogers*, *ante*, the agreement was not to apply money which the promisee delivered for the purpose, or which was due him from the promisor, to the use of a third party, but the promisor engaged to advance his own money for the purpose of protecting the property of the promisee, which advance when made would become a lien on the property of the promisee, and was made for the benefit of the promisee only.

Where one receives a conveyance of land to himself from a mortgagor, in which conveyance there is a stipulation, that he, as party of the second part, will pay off and discharge the mortgage, as a part of the consideration of the premises, he was held, in *Ricard v. Sanderson*, *ante*, personally liable to the holder of the mortgage for the amount due thereon, although the deed was not signed or subscribed at all by him, and was taken merely as security for an indebtedness owing to him by the firm of which the mortgagor was a member.

In *Miller v. Winchell*, 70 N. Y. 437, the owner of certain premises executed a mortgage thereon to defendant, who agreed, by parol, to pay two former mortgages on the premises, and, after deducting the amount thereof, pay to the mortgagor the balance secured by his mortgage. The mortgagor subsequently sold and conveyed the premises to plaintiff, with covenant of warranty, subject to defendant's mortgage. In an action to compel defendant to pay and cancel of record prior mortgages, or to have the amount thereof indorsed upon his mortgage, it was held that plaintiff was not entitled to recover upon the theory that defendant's promise was made for his benefit, as at the time it was made, he had no relation to or interest in the land. The holder of the prior mortgages could have maintained an action to enforce the defendant's promise, within *Lawrence v. Fox*, *ante*, and *Burr v. Beers*, *ante*.

In *Campbell v. Smith*, 71 N. Y. 26, the owner of certain premises upon which was a mortgage executed by said owner and held by plaintiff, executed and delivered a deed thereof, which recited the deduction of the amount of the mortgage from the purchase price, and contained a covenant on the part of the grantee to pay the same. The name of the grantee was left in blank with authority to the holder of the deed to insert the name of any person. The holder, being indebted to a firm of which defendant was a member, agreed with the latter to insert his name in the deed, and that any profits which might be made should be applied on the firm debt;

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and defendant subsequently conveyed the premises. In an action brought upon the covenant in the deed to recover a deficiency arising on foreclosure, it was held that defendant, by consenting to the insertion of his name as grantee and accepting the deed, occupied the position of purchaser, with all the rights and obligations incident to that position as between him and the grantor, and that plaintiff was entitled to enforce the covenant against him; that the defendant's arrangement with the holder of the deed did not impair the right of the mortgagee or his assignee, but that it was collateral to the deed, and only affected the parties to it.

Independently of *Lawrence v. Fox*, the covenant of a grantee in an absolute deed, who, as part of the consideration, assumes and agrees to pay incumbrances on the land for the payment of which the grantor is personally bound, may be enforced by the creditor in an equitable action upon the doctrine of equitable subrogation. *Pardee v. Treat*, 82 N. Y. 385; *Halsey v. Reed*, 9 Paige, 446; *Kirk v. Whitely*, *ante*; *Garnsey v. Rogers*, *ante*.

But it is not in every case that a covenant to pay incumbrances contained in a deed of land is available to, or can be enforced by, the creditor, in either an equitable or legal action.

An assumption clause in a deed can only be enforced by a lienor, where in equity the debt of a grantor secured by the lien becomes, by the agreement between him and his grantee, who assumes the payment, the debt of the latter. On the other hand, if the assumption is in aid of the grantor, upon the security of the land, and not as between them, a substitution of the liability of the grantee for that of the grantor, or in other words, if, in equity as at law, the grantor remains the principal debtor, then the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee, for any breach of his obligation, is to the grantor only. Where the grantee is in equity bound to pay the debt as his own, then the covenant, according to the case of *Burr v. Beers*, may be treated as a promise made for the benefit of the lienor, and may be enforced in a legal action, although, even in that case, it would seem that the primary object of the covenant is to protect the grantor against his personal liability for the debt secured upon the land. *Pardee v. Treat*, *ante*.

In this case, a deed, absolute on its face, was executed to defendant, containing a covenant upon the part of the latter to pay certain liens, but was intended simply as security for a debt of the grantor to the defendants, and in accordance with the agreement of the parties, and as part of the same transaction, defendants executed a contract agreeing to convey to the grantor's wife, on the payment by her of the amount of the liens and defendant's debt, which amount she agreed to pay at a specified time. And it was held that an action by a lienor to recover of defendants the amount of his lien was not maintainable; and that the fact that the deed vested the legal title to the land in the defendants was not decisive on the question

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but that the conveyance was an equitable mortgage, although the defeasance was to some other than the grantor.

In *Hand v. Kennedy*, 83 N. Y. 149, plaintiff sold to defendant certain premises, taking a mortgage thereon to secure a portion of the purchase money, and subsequently the grantee conveyed to two parties undivided interests in said premises. The latter deed recited that the parties thereto were jointly interested in the purchase from plaintiff, though the title had, for convenience, been taken in the name of the first grantee for the use and benefit of all in certain specified proportions, and that the grantees had assumed and agreed to pay their proportions of said mortgage. This conveyance was made subject to the mortgage, and the proportions thereof, which the grantees assumed and agreed to pay as part of the consideration, were specified. In an action to recover a deficiency arising on the foreclosure of the mortgage, it was held that there was a sufficient consideration to sustain the covenant of the grantees, and that plaintiff, as mortgagee, could enforce the same. The right to maintain the action rests upon the principle laid down in *Lawrence v. Fox*, and kindred cases.

A covenant in a deed, absolute on its face, but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, was held, in *Root v. Wright*, 84 N. Y. 72, to be in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither party to the contract, nor the one for whose benefit it was made.

There is no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where it is void as between the promiser and promisee, for fraud, or want of consideration, or failure of consideration. *Dunning v. Leavitt*, 85 N. Y. 30. *

In this case a grantee holding under a warrantee deed, who, by a covenant in his deed, had assumed and agreed to pay a mortgage on the premises, was evicted by a paramount title, and it was held that the holder of the mortgage could not enforce the covenant, since the substantial consideration therefor is the conveyance of a title, and, upon eviction, the consideration wholly failed. The mortgagee, who seeks to avail himself of such a covenant, claims under and through the grantor, and his claim is subject to defenses arising out of a transaction between the original parties, when the deed was executed.

The question as to the effect of a mortgage assumption clause on the part of a grantee in a conveyance by deed-poll, signed by the grantor only, was considered in *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, and the court by Earl, Commissioner, expressed the opinion that a grantee in such a deed becomes bound, upon acceptance, as covenantor to pay the mortgage. Though the decision of this point may not have been essential to support the judgment in this case, the question was carefully considered by the

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court, and many authorities tending to sustain the conclusion reached, were cited, as well as numerous expressions of judges in the courts of this state, recognizing the doctrine maintained in the opinion. *Bowen v. Beck*, 94 N. Y. 86.

In this case, it was held that, where a conveyance of real estate, purporting to be an indenture and containing a clause by which the grantee assumes and agrees to pay a mortgage upon the lands conveyed, has been accepted by the grantee, it will, for the purpose of a remedy against the grantee, be considered as the deed of both parties, and the clause as a covenant.

An agreement of a purchaser of real estate to pay the holder of a mortgage, as a part of the consideration, the amount thereof where it had been intended and was in effect an assignment of an original mortgage on the mortgaged premises, was held, in *Rush v. Dilks*, 43 Hun, 282, to be supported by a good and valuable consideration, and enforceable for the benefit of the holder of such later mortgage.

In *Met. Trust Co. v. N. Y., L. E. & W. R. R. Co.*, 45 Hun, 84, on an agreement between two railroad companies as to the management of the companies and the interchange of their business, the Erie Company agreed to use its influence and exercise its control to promote the interests and the business of the Tonawanda Company, and to make good any deficiencies, in the net earnings of the latter company, to meet the interest upon its bonded indebtedness from time to time as the same became due and payable, and for any and all advances so made by it, with interest thereon, as well as for any and all advances so made to the latter by the former company with interest thereon; and the Erie Company was given a first lien upon the railroad, franchises and property of the Tonawanda Company, next after its bonded indebtedness, and a first charge upon its surplus earnings next after the payment of the accruing interest upon its said bonded indebtedness. The Tonawanda Company made default in the payment of the interest due on its bonds, and the Erie Company failed to make good the deficiencies. In an action brought by a trustee to foreclose a mortgage given to secure said bonded indebtedness and interest and for any deficiency that might arise on the sale, it was held that the plaintiff was not entitled, in such action, to a judgment for deficiency against the Erie Company, upon the ground that he was not, under the said agreement, entitled to enforce the promise of the Erie Company therein contained, as it was not made for the benefit of the bondholders, but only for the benefit of the company itself.

There has been some diversity of opinion as to the ground upon which the liability of the grantee in a deed, who has assumed a mortgage, must rest, and it has finally been settled that it may rest upon the doctrine, that where one person makes a promise to another for the benefit of a third person, the latter may maintain an action upon it. *Thorp v. The Keokuk Coal Co.*, 48 N. Y. 253; *Burr v. Beers*, *ante*. In such case it is not needful

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that there should be any consideration passing from the third person. It is sufficient if the promise is made by the promisor upon a sufficient consideration passing between him and his immediate promisee, and when the third person adopts the act of the promisee in obtaining a promise for his benefit, he is brought into privity with the promiser, and he may enforce the promise as though it was made directly to him. *Lawrence v. Fox, ante*; *Thorp v. The Keokuk Coal Co., ante*.

In the latter case the defendant accepted a deed of certain premises containing a clause that it was made subject to a mortgage which the grantee thereby assumed and promised to pay. In an action by the mortgagee upon the assumption clause in the deed, it was held that he could maintain an action upon the implied covenant in said deed, without first foreclosing the mortgage, though the bond accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligor would only be answerable for the deficiency.

In *Schley v. Fryer*, 100 N. Y. 71, the action was based upon a clause in a deed to the defendant which reads as follows: "This conveyance is made subject to two certain mortgages for \$4,000 each, and which said party of the second part assumes with interest from the 22d day of August, 1871." The defendant claimed that the word "assumes" was not broad enough to impose a personal liability upon him to pay the mortgage in question, but the court held that the word must have the same meaning which it would have if the words "to pay" followed it.

The defendant also claimed that, as he assumed the mortgage merely which contains no covenant to pay, he did not become liable to pay the bond, and therefore incurred no personal liability; but the court declared that it was the clear intention of the parties that the grantee should assume the payment of the mortgage debt, and not merely take the real estate subject to the mortgage, and held that, in cases of this kind where the grantee has been made personally liable by an assumption of a mortgage upon the granted premises, the liability has generally been imposed by an agreement or covenant to assume or pay the mortgage with no special reference to, or designation of, the mortgage debt, or the bond to which the mortgage was collateral.

It was also held in this case that, where it appears that the grantee in such a deed has given to another, by whom the purchase of the land was made, general authority to deal in real estate in his name, he was bound by the covenant, although he permitted the ostensible agent to reap the benefits of his dealing, and did not know that the clause was in the deed, and never specially authorized its insertion.

In partnership transfers.—In *Hall v. Robbins*, 4 Lans. 463, the defendant, in consideration of goods sold and delivered to him by a certain firm, agreed with them to pay the plaintiff's firm the amount of a debt due from the former firm to them. Plaintiff's firm subsequently assigned their claim to

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plaintiff. In an action on said agreement by plaintiff against defendant, it was held that a promise made upon a valid consideration to pay a third person, will sustain an action by the third person in his own name against the promiser.

Where, upon the dissolution of a firm, a new firm is formed, which assumes all the debts of its predecessor and takes all its assets, such new firm was held, in *Carman v. Kelly*, 5 Hun, 283, to become primarily liable for such debts to the creditors of the old firm, although the original debtors have neither been released nor discharged therefrom; following the doctrine of *Lawrence v. Fox*, *ante*; *Hartley v. Harrison*, 24 N. Y. 170; *Dingledein v. Third Ave. R. R. Co.*, 37 Id. 375; *Hutchings v. Miner*, 46 Id. 456.

In *Melvain v. Tomes*, 14 Hun, 31, a firm, composed of the defendant and the plaintiff, borrowed of the plaintiff as executor and trustee of an estate a sum of money. The firm was subsequently dissolved, and defendant, in pursuance of an agreement, took all the assets, and agreed to pay all the debts including that due to the said estate. In an action against defendant by the plaintiff, as such executor and trustee, to recover the same, it was held that the promise of the defendant inured to the benefit of the estate, and that it could be enforced by the plaintiff.

In *Dingeldein v. The Third Ave. R. R. Co.*, 37 N. Y. 575, the property of a partnership consisting of a railroad franchise, a road partly built, cars, horses, sleighs, harness, leases and licenses, was transferred to a corporation, subject to the payment by the said corporation of all the money which the partnership was bound to pay on account of sewers, specifying the claim in question, and it was held, in an action on said claim, that the creditor of the firm could maintain an action against the corporation, and was entitled to recover from it the amount due to him from the partnership.

A party who agreed with a partner in a firm, in consideration of the latter's transfer of his interest, to assume the payment of the firm debts, was held in *Berry v. Brown*, 22 W. Dig. 103, liable to a firm creditor, though the written agreement subsequently entered into between the parties was in the name of the promisor's wife, where it was the design and intention of the parties that the contract should be with him.

In *Allendorph v. Wheeler*, 23 W. Dig. 319, a firm was dissolved by the retirement of one of its members, and a new firm was formed with new members which took the assets of the old firm, and, in consideration thereof, assumed and agreed to pay its debts, and a creditor of the old firm was permitted to maintain an action against the new firm to collect his claim.

In *Edick v. Green*, *ante*, a partnership was dissolved by the sale by one partner of his interest in the firm, subject to the firm debts, to a third party. By the written agreement then made the partner agreed that the purchaser's interest should be an equal undivided one half, and covenanted that the collectible accounts were sufficient to pay all the debts due from the firm, and that if they could not, after efforts to collect them, be collected, he would make good the deficiencies. In consideration of this covenant, the

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purchaser agreed to pay one half of the debts of the said firm and to take the retiring partner's place in the firm as an equal partner. In an action, brought by a creditor of the former firm against the members of that firm and the purchaser, it was held that the agreement between the selling partner and the purchaser imposed no liability upon the latter to pay the firm debts, which could be enforced by creditors holding such claims; that such an agreement is not a promise made for the benefit of the creditors, although they might be benefited by its performance. See also *Pardee v. Treat, ante*.

In *Merrill v. Green, ante*, one partner, upon the dissolution of a firm, executed to another a bond with a surety, conditioned for the payment by the partner executing it of all the firm debts, and it was held, that the liability of the obligors was to the obligee only, not to the creditors, and that an action could not be maintained thereon by a firm creditor to recover his indebtedness of the obligors.

In *Claffin v. Ostrom*, 54 N. Y. 581, a partner sold out his interest in the firm property to his copartner, who agreed to pay the firm debts, among which was a debt due plaintiffs, and defendant guaranteed the performance of this agreement. Plaintiffs' debt was not paid, and the selling partner assigned to them his interest and claim under the agreement and the guarantee. In an action to recover the amount due plaintiffs, it was held that they were entitled to recover, either directly on the guarantee, which they could adopt and enforce in their own name, or upon the assignment.

Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers his assets to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement was held in *Arnold v. Nichols*, 64 N. Y. 117, to be made for the benefit of the creditors holding the claim specified, and an action could be maintained by such a creditor against the firm upon such agreement. The assets to which the transferrer's creditors had the right to look for the payment of their claim were conveyed to the firm, and hence the promise of the firm to pay such claims must be deemed to have been made for their benefit. It was not made to exonerate the transferrer from the payment of his debts, and not primarily nor directly for his benefit, since his property was to be taken to pay the debts, and he was still to remain liable as one of the principals to pay them. The case is, in this respect, unlike the case of *Merrill v. Green, ante*; and the action is maintainable upon the principles laid down in the case of *Lawrence v. Fox, ante*, and recognized in *Burr v. Beers, ante*. *Thorp v. Keokuk Coal Co., ante*, and *Claffin v. Ostrom, ante*. The creditor had the right to adopt the promise made expressly for his benefit.

It was held in *Wheat v. Rice, ante*, that a creditor of a firm cannot maintain an action upon an agreement made with the firm, by one not a member, to pay a portion of its indebtedness, on the ground that no one

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creditor can show from the contract that it was intended for his benefit, or covers any part of his debt.

It would be a very great extension of the doctrine of *Lawrence v. Fox*, *ante*, to give a right of action to a creditor for whose benefit the promise might, or might not, have been made. In *Barlow v. Myers*, 64 N. Y. 41, where the promise was to pay generally, the debts of the firm, without specification of the particular debts, or naming the creditors of the firm, attention was called to the fact that in this respect the case was different from all the cases in which the right of action had been sustained in behalf of the third party. But there it was possible to say that the creditors were sufficiently identified as belonging to a class all of whom were to be paid; but where no class is named or described, who were to be paid by the promiser, or the extent is left absolutely uncertain and undetermined, the doctrine of *Lawrence v. Fox*, should be restricted within the precise limits of its original application.

An agreement by a third person with an outgoing member of a firm to relieve him from, and indemnify him against, the firm debts, where no consideration passed to the promiser, was intimated in *Berry v. Brown*, 107 N. Y. 659, not to be enforceable against him by a creditor of the firm. It was regarded as an agreement for the benefit of the outgoing member to relieve him from, and indemnify him against liability, with no intention to secure any benefit to the firm creditors; and, as the sale was not made to the third person, and no consideration whatever passed to him, the creditors, who are strangers to the agreement, cannot enforce it against him. See also *Merrill v. Green*, *ante*; *Simson v. Brown*, *ante*.

Moral obligation.—In *Bull v. Bull*, 31 Hun, 69, the testator determined to change his will previously made by adding a codicil, so as to give a certain sum to be divided among six nephews, of whom plaintiff was one. He stated his intention to the executor of the existing will, who told him that he need not make a codicil, but that he would pay to each of the nephews the respective amount. The testator died without making such codicil; and, while the executor was willing and ready to pay the amount to the nephews, the residuary legatees refused to consent, and no payment was made. The executor died, and the plaintiff, to whom the other nephews had assigned their claims, brought an action against the executor's estate upon his promise to the testator, and it was held that he could not recover, on the ground that, even though it was a personal promise on the part of the executor, he was not a legatee or devisee, and did not divert, by his promise, to his own benefit, anything from the plaintiff and his assignors, nor practice any fraud upon them. In all cases bearing upon this subject, the promise, which has been enforced, has been made by a person who, by descent, devise or bequest, has received from the decedent, property out of which the proposed devise or legacy would have come, but which was prevented by the promise of the person thus held liable. *Id.*; *Crippen v. Crippen*, 53 Hun, 232, and reported above.

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In this case it was held that, in order to recover upon a promise to pay money, made by a person who, by descent, devise or bequest, as, it is claimed, received from a decedent property, out of which the decedent wished that the amount so promised should be paid, it must affirmatively appear that such person has received property from the decedent; and mere proof that the promise to pay has been made by him is not sufficient to justify a recovery.

In *Todd v. Weber*, *ante*, plaintiff, an illegitimate child of whom defendant's testator was the putative father, which relationship he acknowledged, was supported, cared for and educated by relatives of her mother from the time of her birth until the death of said testator, at his request and on the strength of his repeated representations and promises that they would be paid; and that in case she survived him, he would provide for her by his will sufficient to pay for such maintenance and care. Plaintiff, after she became of age, having been informed of these promises, and in reliance upon them, promised to pay the expenditures so incurred for her benefit. No such provision was made in the will. And it was held that the facts established an agreement binding in law upon the testator, and enforceable against his estate. An action therefor was maintainable and properly brought in plaintiff's name.

In the *Matter of Will of O'Hara*, 95 N. Y. 403, it was held that, where a person, even by silent acquiescence, encourages a testator to make a devise or bequest to him, with a declared expectation that he will apply it for the benefit of others, it has the force and effect of an express promise so to apply it, and if he does not intend so to do, the silent acquiescence is a fraud; and that, where the gift is to several as joint tenants, and the promise to carry out the declared purpose of the testator is made by one of them, it is obligatory upon all.

In *Knowles v. Erwin*, 43 Hun, 150, a father executed a deed to his son for a nominal consideration and took a written agreement to pay his daughter a specified sum of money at a specified future time. The grantor delivered the paper to his son-in-law to be kept safely, who subsequently delivered it to the daughter. In an action by the said daughter against the son to recover, on said written agreement, the stipulated amount, it was held that the relationship existing between the parties was a sufficient present consideration to sustain the promise and that the plaintiff could recover in a direct action.

The relation of creditor and debtor did not, but that of parent and child did exist, and it was the purpose of the father, by the papers executed, to make a distribution of the estate between his children. Where such relationship exists, it has always been held to present a sufficient consideration to support the promise. *Id.* Since the consideration was such as is recognized by the courts, the case presented the simple question of a promise from one person to another to pay a debt to a third person.

The right of a third person to recover of the promiser for such debt, is

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unquestioned. *Id*; *Schermerhorn v. Vanderhyden, ante*; *King v. Whiteley, ante*; *Lawrence v. Fox, ante*; *Burr v. Beers, ante*; *Rogers Locomotive and Machine Works v. Kelley*, 88 N. Y. 234.

In *Gates v. Hames*, 55 Hun, 602, the mother of the defendant who was the grandmother of the plaintiff held a mortgage on real estate belonging to the defendant. She discharged the mortgage in consideration of an agreement of the defendant to pay the amount due thereon by boarding her, if she chose to live with her, and, if she did not choose to do so, to pay the amount, after her death, to five persons including the plaintiff. She did not afterwards live with the defendant, and, after her death, the plaintiff brought an action against the defendant on said promise. And it was held that the promise was one which cannot be enforced by the third persons for whose benefit it was made. To give a third party, who may derive a benefit from the performance of the promise, an action, there must be a legal right, founded upon some obligation of the promisee, in a third party, to adopt and claim the promise as made for his benefit. But in this case there was no such legal or moral obligation, debt or duty owing by the promisee to the plaintiffs. The benefit which the former sought by the contract to provide for the latter was a mere gratuity, the motive of which seems to have been love and affection, a sufficient consideration to support a deed or an executed contract, but which cannot render obligatory a mere promise or executory agreement. In the case of *Todd v. Weber, ante*, the court held that the natural obligation arising out of the relation of the putative father to his child will uphold a contract upon which an action may be sustained; and thus the case was brought directly within the rules stated in *Vrooman v. Turner, ante*, which requires a legal or moral obligation owing to the party to be benefited by the promise, to support an action by him on a promise made to another.

But in *Gates v. Hames, ante*, the grandmother was under no obligation to contribute to the support of the plaintiff, or to give her any portion of her estate, and there was no debt or duty owing from her to plaintiff. The promise of the defendant, therefore, was one which could not, under the cases, be enforced by the plaintiff.

When irrevocable. In *Ranney v. McMullen*, 5 Abb. N. C. 246, the mortgagor, after a conveyance of the mortgaged premises by him to one who assumed the payment of the mortgage, released the grantee from his covenant to pay the mortgage. And it was held that, in such a case, this did not release the grantee from his liability to the mortgagee. The release of the mortgagor by the creditor was held, in *Bentley v. Vanderheyden*, 35 N. Y. 677, not to operate as a discharge of his grantee, who has assumed the mortgage; and no ground or principle can be perceived upon which the mortgagor can do more than discharge the liability of the purchaser to himself.

The right of the third party benefited by the promise, at least before he has accepted and adopted it, is of such derivative and imperfect character

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if, indeed, it attaches at all, and is so subject to the relations and equities of the original promisor and promisee, that the destruction of the consideration of the promise in the one case, and the rescission and annulment of the contract in the other, in actions to which the alleged beneficiary is no a party and in which he has not been heard, bars and prevents him from any right of action upon the promise. An acceptance or adoption of the promise by word or act, on the part of the third person is essential; *Wheat v. Rice, ante*; *Dunning v. Leavitt, ante*; *Crowe v. Lewin*, 95 Id. 423; *Turk v. Ridge, ante*; *Garnsey v. Rogers, ante*; *Brumen v. Turner*, 69 Id. 285; *Knickerbocker Life Ins. Co. v. Nelson*, 78 Id. 151.

In *Frank v. The N. Y., etc., R. R. Co.*, 44 Hun, 624, it was held that the legal right of a party to assert that the performance of a contract made between two others for his benefit cannot be revoked or modified without his consent, rests in the fact of an expressed promise on the part of the person whom he seeks to charge, and thus arises a privity of contract. Such is the doctrine of *Lawrence v. Fox*, and kindred cases.

In *Ward v. Cowdrey*, 51 Hun, 641, it was held that a promise to pay a third person a debt due him by the promisee may be enforced by the latter against the promisor's estate, in the absence of evidence that the third person knew of and acquiesced in the promise. He could bring an action, and leave the promisor's estate to prove such facts as deprived him of the right to enforce his claim.

In *Gifford v. Corrigan*, 117 N. Y. 257, one McEvoy, a parish priest owning certain premises on which there was a mortgage, executed and recorded a deed thereof to Cardinal McCloskey, in which the payment of the mortgage was assumed by the latter. After an action of foreclosure of said mortgage was begun, McEvoy's executor formally released the Cardinal from his covenant, reciting that it was inserted by mistake, etc. It was held that the release was wholly ineffectual; that such a contract was not revocable after it came to the knowledge of the mortgagee, and he has assented to it and adopted it as a security for his benefit. By his assent and adoption the mortgagee brings himself in privity with the contract, elects to avail himself of it, and must be assumed to have governed his conduct accordingly. The right of action against the grantee must have arisen at once upon the delivery of the deed, or at the latest when the promise came to the knowledge of the mortgagee and upon his assent to and adoption of it. While no right of the mortgagee is invaded by a change of the contract before it is brought to his knowledge and he has assented to and acted upon it, yet to permit a change thereafter, while the creditor is relying upon it, would be grossly inequitable and practically destroy the right which has maintained itself after so long a struggle.

In *Knickerbocker Life Ins. Co. v. Nelson, ante*, the owner conveyed real estate covered by four mortgages to another, subject to said mortgages, which the deed recited were part of the purchase price of the premises.

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The grantee conveyed the premises to a third party, subject to the same mortgages, and the latter reconveyed to the first grantor; the latter conveyance was not made subject to the mortgages. It was held that, as the mortgagee had no knowledge of the assumption of the mortgages, did not assent to it and was not the party intended to be benefited, it was in the power of the grantor and mortgagor to so change the relation that the obligation on the part of his grantee should be cancelled, and the dedication of the land to the payment of the mortgages revoked. See also *Simson v. Brown, ante*; *Merrill v. Green, ante*; *Kelly v. Roberts, ante*; *Thorp v. Keokuk Coal Co., ante*

LEWIS NORDLINGER, Appellant, v. ADOLPH ANDERSON,
et al., Respondents.

Supreme Court, Second Department, General Term May 24, 1889.

1. *Witnesses. Credibility.*—A general assignment for the benefit of creditors will not be declared fraudulent on the unsupported testimony of the assignors, where it is contradicted by the testimony of several unimpeached witnesses.
2. *Deposition. Where set aside.*—Where the testimony of a witness taken by commission, was given under written memoranda or directions sent to him on behalf of a party before the deposition was taken it furnishes sufficient ground to suppress the deposition, if the application is made before the trial; and when such fact is made to appear at the trial, the trial judge has power to suppress the deposition.

Appeal from judgment dismissing the complaint upon the merits.

Frederick W. Hinrichs, for appellant.

James M. Hunt, for respondent, Charles Muns.

John H. Corwin, for respondent, Harris.

MACOMBER, J.—The only question before us is one of fact. The learned judge at the trial, evidently upon an attentive examination of the evidence, has dismissed the complaint upon the merits.

The ground upon which it was sought to set aside the assignment made to the defendant Harris by the defendant Anderson for the benefit of creditors, was that the respondent Charles Muns was preferred in the sum of \$2,000 more than was the actual indebtedness of the assignor to him; and that there had been an unlawful and fraudulent disposition of funds of the assignor, immediately prior to the assignment.

The clear weight of the evidence shows that both of these

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grounds of assault upon the assignment are untenable. It is conclusively established that the indebtedness of the firm to Charles Muns was \$9,000, being \$2,000 in excess of the sum for which he was preferred in the assignment.

Several unimpeached and apparently just witnesses show that the other claims against the validity of the assignment were untenable, and that there was no unlawful payment of funds of the firm preceding the assignment.

Against the evidence upon which the learned judge at special term has rested his decision, there is substantially the unsupported testimony of Adolph Anderson alone. His deposition was taken by commission at New Orleans. It appeared upon the trial that such testimony was given under written memoranda or directions sent to him in behalf of the plaintiff before his deposition was taken. Had this been known before trial, it would have been sufficient to suppress the deposition.

On the whole we are inclined to think, when such fact was made to appear at the trial, the judge had the power then to suppress it. But this proposition is unimportant now, in view of the final disposition that was made of the case by him. The judgment should be affirmed with costs.

VAN BRUNT, Ch. J., and BARTLETT, JJ., concur.

FRANK PHELPS, Appellant, v. JOEL B. ERHARDT, Receiver,
etc., Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Landlord and tenant. Assignment.*—The lessee, where there is no provision in a lease that he will not assign without the lessor's consent can assign his right to a new lease, for the renewal term, and such right does not, in such case, depend upon the consent of the lessor.
3. *Same Receiver.*—Where the assignee is acting in the capacity of a receiver, and exceeds his duty so such, in taking the lease, it is a matter for him to settle with the court and in no ways concerns the lessor. Whether his disbursements in connection with the lease will, or will not, be allowed upon the settlement of his accounts, depends upon whether the court does or does not approve of his action.

Appeal from a judgment on a counterclaim awarding specific performance of a contract to renew a lease.

Thomas E. Rochfort, for appellant.

Elihu Root, for respondent.

VAN BRUNT, P. J.—On September 18, 1882, the plaintiff held a lease of pier forty, from the city of New York, to expire May 1, 1887, which lease contained a privilege of renewal for five years, on the plaintiff's giving ninety days notice of his desire to avail himself of that privilege. Subsequently, in said year, the plaintiff let the premises to the Merchants and Miners' Transportation Company for the full term of years yet unexpired of the lease, with the privilege of renewal. In September, 1885, the transportation company let to the defendant the same premises for the balance of the original term, and assigned to him the privilege of renewal which said company had, such renewal to be obtained without liability of said company to the lessor on said renewal.

Ninety days before the expiration of the lease, defendant

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notified plaintiff that he elected to have the lease from the city to plaintiff renewed, to which the plaintiff replied, refusing to recognize any right or interest which the defendant might have. The plaintiff exercised his privilege to have the original lease renewed, and a new lease for the renewal term was duly executed to him by the city. In April, the plaintiff notified the defendant that if he remained in possession after May 1st, the rent would be \$20,000 a year, to which notice defendant replied that the plaintiff had no power to fix the rent, and on the same day notified him that as soon as the plaintiff gave him the renewal of lease, to which he was entitled, he would pay the rent called for by it. The right of the defendant to a renewal lease was denied by the plaintiff. The defendant remained in possession, and the plaintiff commenced this action to recover for use and occupation. The defendant, answering, set up, among things, the right to a renewal lease, arising from the facts above stated, and demanded a specific performance of the agreement to give a renewal. The plaintiff replied, denying the right to renew, and upon the issues thus joined, the counterclaim was tried at special term, and judgment thereon for the defendant rendered, and from such judgment this appeal is taken.

The grounds which the appellant urges are :

First. That the transportation company could not assign its covenant for renewal in such a way as to relieve itself of liability to plaintiff.

Second. That the assignment actually made by it was not complete, but dependent upon obtaining plaintiff's consent, which was never obtained.

Third. That the defendant had no authority to take the renewal lease.

The answer to the first and second grounds, above stated, seems to be that there is no provision in the agreement between Phelps and the transportation company that the company would not assign without Phelps' consent, and

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there is nothing in said agreement which indicates that it is based on considerations personal to the transportation company. The transportation company had, therefore, a right to sublet and to assign its right to a new lease for the renewal term, and such right was not in any way dependent upon the consent of the lessor. *Crosbie v. Tooke*, 1 Mylne & Keen, 431.

If the plaintiff had desired to restrict this right of assignment, he might easily have done so, but not having done so, he cannot fetter a perfectly legal right by imposing a condition not contained in the original contract. The provision in the assignment to defendant that the renewal to him should be obtained without liability on the part of the company to the lessor, in no way affects the right to a renewal, as it had the right to do, and the assignee having, because of such assignment, become entitled to recover, as matter of right, from the lessor such renewal, no liability of the transportation company upon the renewal lease could exist.

The legal relations of the parties are precisely the same as though the plaintiff had agreed to give a renewal of this lease to the transportation company, or its successors or assigns. The words successors or assigns are entirely unnecessary to render this right to renewal transferable. In the agreement to renew, there being no indication that such agreement was made upon considerations personal to the company, it was just as transferable as though the word assigns had been inserted.

The only remaining ground is that the defendant had no authority to take the renewal lease. It may be doubtful whether this question can be raised under the pleadings, no such issue being presented.

In any event, if the defendant exceeded his duty as receiver in taking this lease, it is a matter for him to settle with the court, whose servant he was. It in no way concerned the plaintiff. The defendant, as receiver, would be

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bound to the plaintiff, but whether his disbursements in connection with this lease would or would not be allowed upon the settlement of his accounts, depended upon whether the court did or did not approve of his action.

Furthermore, no such ground of refusal to execute a renewal was given at the time. If such ground had been stated it was possible for the receiver to remedy it. Where a refusal is absolute, it is a denial of the right under any conditions.

The reservation of the right to apply for further instructions was proper, as questions may come up in the execution of the decree which may require the consideration and direction of the courts.

The case upon appeal has been very imperfectly made up. No judgment roll is printed, and the first, second, third and fourth pretended findings of fact in no way comply with the requirements of the Code.

The judgment appealed from should be affirmed, with costs.

LAWRENCE, J., concurs.

JESSE WATSON, Appellant, v. E. FRANK COE, Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Injunction. Personal service.*—Where an injunction, restraining all creditors from further prosecution against stockholders, is granted, it is not necessary to serve the injunction order personally upon the plaintiffs, but it is sufficient, for the purposes of the motion to postpone the trial of the actions, that the creditors or their attorneys have knowledge of its existence; and the only way in which they could rid themselves of the effect of the injunction in the omnibus suit was to seek its dissolution therein so far as they were concerned.
2. *Same.*—The fact that the motion to set aside the injunction is not decided within twenty days after it was submitted for decision, does not affect the validity of its disposition.

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Appeal from an order, staying the proceedings of the plaintiffs.

W. W. Badger, for appellant.

Edward B. Merrill (*H. D. Hotchkiss* of counsel), for respondent.

VAN BRUNT, P. J.—This is one of several actions against stockholders of the American Opera Company (limited), to recover of the several defendants the amount of the plaintiff's claims against the company.

An action was brought by S. Skiddy Cochran and another on behalf of themselves and all other creditors of the American Opera Company (limited) against the stockholders of said company, to enforce the claims of all the creditors thereof against said stockholders, and in said action an injunction was granted, restraining all the creditors, whether parties to the action or not, until the further order of the court, from commencing a further prosecution or taking any further proceeding against any of the stockholders of said company to recover from said stockholder the amount of his statutory liability as stockholder for any debt of said company. Of the existence of this order the attorney for the appellant was well aware. But it appears that the same was not served upon the plaintiffs personally. These actions coming up for trial, a motion was made to postpone the same in consequence of the existence of this injunction. The matter was referred to the judge holding the special term, and a motion was there made for such stay, which motion was granted, and from the order entered thereon this appeal is taken.

The principal ground which seems to be assigned by the counsel for the appellant is that the order should not have been made, because the injunction order was not served personally upon the plaintiffs. For the purposes of this motion, it does not appear to have been necessary to serve the in-

junction order personally upon the appellants, but that it was sufficient to show that they or their attorneys had knowledge of its existence. *Armitage v. Hoyle*, 2 How. Pr. N. S. 438; *Hull v. Head*, 3 Edw. Ch. 236.

Upon these facts appearing, the court was bound to stay the proceedings on these trials, and the only way in which the plaintiffs could rid themselves of the effect of the injunction in the omnibus suit was to seek its dissolution therein so far as they were concerned.

Neither is the claim that the decision upon the motion to set aside the injunction was not finally rendered within twenty days after it was submitted for decision, any answer to the question as to the validity of the injunction. There is no provision contained in the act which deprives the court of jurisdiction in case such application is not decided within twenty days, and therefore the provision is merely directory, and even if the motion is held beyond that time, it, in no way, affects the validity of its disposition.

It seems to us, therefore, that the plaintiffs cannot, so long as the injunction in question remains in force, compel the trial of these actions, but must get rid of that injunction before they can proceed herein.

The order appealed from must be affirmed, with ten dollars costs and disbursements.

MACOMBER and BARTLETT, JJ., concur.

Opinion of the Court, by MACOMBER, J.

FREDERICK PECK, Appellant, v. THE PHOENIX INSURANCE
COMPANY, Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

Costs. Security for.—Where the amount of security for costs previously filed by plaintiff will not be sufficient to indemnify defendant against costs, the appellate court will not interfere with the exercise of the special term's discretion in requiring additional security to be given, even though the plaintiff has recovered a verdict for a large amount, where the trial court has ordered the defendant's exceptions heard at the first instance at the general term.

Appeal from an order, requiring the plaintiff to give additional security for costs, and staying his proceedings in the meantime.

J. A. Shoudy, for appellant.

George A. Black, for respondent.

MACOMBER, J.—Should the case finally go against the plaintiff, it is clear, from the appeal book, that the amount of security heretofore filed would not be sufficient to indemnify the defendant against costs. It is true that the plaintiff has, at the end of the fourth trial, obtained a verdict for upwards of \$10,000. No judgment, however, has been entered thereon, but the learned trial judge directed the exceptions to be heard at the general term, in the first instance. There is, therefore, no determination by the court that the plaintiff is right in his contention. It is true that the verdict carries with it every intendment in favor of the plaintiff's ultimate success, so far as the facts are involved, but there was doubtless in the mind of the learned judge a doubt as to some important questions of law involved, and hence it appeared that the case was not so clearly in favor of the plaintiff as to warrant a judgment in his favor until the general term had so adjudicated.

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Under these circumstances, we are not disposed to interfere with the exercise of the discretion of the special term, in requiring additional security to be given.

It follows that the order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, Ch. J., and BARTLETT, J., concur.

MORRIS SAFFER, Respondent, v. THE DRY DOCK, EAST
BROADWAY, ETC., R. R. Co., Appellant.

Supreme Court, First Department, General Term, May 24, 1889.

1. *Question of fact. Negligence.*—Where the evidence is conflicting, in an action for injuries on the ground of negligence, as to the cause of the accident, it is for the jury to decide which of the conflicting theories is best recommended by the evidence to their judgment.
2. *Negligence. Contributory.*—The plaintiff is guilty of contributory negligence, if he does anything in the way of getting off the car, which helps, or contributes, to bring about the injury.
3. *Same. Right of passenger.*—Passengers are not obliged to leave a car until it has been brought to a stand, and have a right to insist upon this privilege, and thus guard and protect themselves against a class of accidents which result from endeavoring to leave the car while it is in motion.
4. *Evidence. Special damage.*—Where special damages are not alleged in the complaint, proof, against specific objection, that the plaintiff was prevented, by the disability which the accident produced, from carrying on his business, is incompetent on the trial of an action for personal injuries on the ground of negligence.
5. *Same. Speed.*—In such an action, the plaintiff has the right to resort to proof as to the rate the defendant's cars were propelled in passing curves, in order to meet the defense that its cars never passed over a curve in the manner described by him.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

John M. Scribner, for appellant.

Samuel Untermeyer, for respondent.

DANIELS, J.—The verdict was recovered for the damages considered by the jury to have been sustained by the plaintiff for a personal injury on the 3d of January, 1887. He was proceeding westerly on one of the cars of the defendant, which he desired to leave at or near the corner of Greenwich and Desbrosses streets; and signalled the conductor to stop the car for that object. The conductor pulled the bell rope and the plaintiff went to the rear platform to leave the car. On his behalf it was stated by himself as a witness on the trial, that while he was standing on the step expecting the car to slack up and stop, that it increased its speed and threw him in a northerly direction from the step, where he was holding on the hand railing, and precipitated him against a wagon, or cart at the side of the street, severely injuring his head and disabling him from employment and business for several weeks after the occurrence. On the part of the defendant this statement of the case was denied. The conductor testified that the car was passing over the curve at the corner of the streets and was diminishing its speed, and that the plaintiff thereupon stepped off as the car was in motion, and the street being slippery at the place, he ran directly against the wagon, striking with his nose the reach which was standing perpendicularly. A passenger who was in the car also testified that he saw the plaintiff go down on the step and step off, when he ran along and struck the wagon that stood there. And it was for the jury to decide which of these conflicting theories was best commended by the evidence to their judgment. If the plaintiff was right, then a case in his favor had been made out; but if he had so far misstated the facts that these witnesses whose testimony was produced by the defendant, were correct in their statement, then the defendant was entitled to a verdict. In the submission of the case to the jury, the defendant's counsel requested the court to

charge, "If the jury believe that while the car was being slowed up, in order to stop in response to the plaintiff's request, the plaintiff, without waiting for the car to be stopped, stepped off the car while in motion, and thereby sustained his alleged injury, then the plaintiff was guilty of contributory negligence, and the defendant is entitled to a verdict on that ground."

The court did not charge this proposition as the law of the case, but stated to the jury, if they believed that while the car was being slowed up and being stopped, the plaintiff stepped off the car while in motion, and thereby sustained his alleged injury, the jury might take that into consideration upon the subject of the contributory negligence of the plaintiff. The defendant excepted to the refusal of the court to charge the proposition as it was in this manner requested. It was a proposition which was within the clear range, or bounds, of the evidence, and the court had enjoined the observance of no principle previously upon the jury dispensing with this direction, if it embodied a part of the law of the case. The most that has been said upon that subject was, that if the car was going around the curve at a gallop, as the plaintiff said it was, and he got off while it was going at that rate, and before it could be stopped, they would not want further evidence on the subject of contributory negligence, but they must determine on this question of contributory negligence as to whether he was or was not thrown off, or whether he got off.

If he got off while the car was in this rapid motion, then it was negligence, and if he did anything in the way of getting off the car which helped, or contributed, to bring about the injury, then there was contributory negligence on his part, and he was not entitled to recover. The part of the charge devoted to the consideration of the imputation made to the plaintiff of contributory negligence did not therefore include the legal proposition as it was presented in and by the request. For by that the cause and respon-

sibility of the accident was placed wholly upon himself. It eliminated entirely all interposition on the part of the car and of the persons in charge of it, and restricted the jury to the consideration of the single point, whether in stepping off the car while it was in motion, and thereby encountering this alleged injury, the defendant was liable for the result. It clearly would not be. For in that event the injury would result from no act, negligence or omission of the defendant. But the sole and whole cause of it would be the plaintiff's leaving the car while it was in motion, and by the impetus of his body running against the wagon standing at the side of the street. The act in this manner brought to the attention of the court would be wholly the act of the plaintiff himself, and if by stepping off the car and passing over to the side of the street after he left it, he came in contact with the wagon, and in that way sustained the injury, there is no principle whatever on which the defendant could be made legally liable for the result.

As the point was in this manner presented, if the injury was so produced, it was caused by what the plaintiff himself voluntarily did, and without anything on the part of the persons in charge of the car contributing to bring it about.

For an injury produced in this manner, the law supplies no principle by which the responsibility can be transferred from the party bringing it upon himself to another in no way responsible for its occurrence.

In *Maher v. Central Park, etc., R. R. Co.* (67 N. Y. 52), the driver directed the boy, who was injured, to get on the front platform of the car, and while he was doing that, started the car with a jerk, throwing him off, and in that manner causing the injury. *Eppendorf v. Brooklyn City R. R. Co.* (69 N. Y. 195) was quite similar in its leading circumstances to the other case. In each, the person injured was thrown off by the sudden starting of the car. That was the cause bringing about the injuries, and they

were attributable only to the drivers in the management of the cars, and not to the persons who were injured. They are entirely and easily distinguishable from this case in this leading circumstance. For here, if this proposition should be found to be true by the jury, neither the car, nor the driver, nor the conductor, in any way interposed to bring about this injury. In *Solomon v. Manhattan R. R. Co.* (31 Hun, 5), the plaintiff was injured in endeavoring to go on board a car in a train which had commenced moving from the station, and it was held he was not entitled to recover for the injury caused in this manner. This was affirmed in the court of appeals (103 N. Y. 438; 3 N. Y. State Rep. 636), where the court held the law to be "that the boarding or alighting from a train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption, and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was, by the act of the defendant, put to an election between alternative dangers, or that something was done or said, or that some direction was given by the passenger, by those in charge of the train, or some situation created, which interfered, to some extent, with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety." *Id.* 442.

The principle may not be applicable with the same degree of force to a person leaving a car drawn by horses upon a public street; but in a modified degree, at least, it is applicable to the case of passengers attempting to leave these cars while they are still in motion upon the street. They are not obliged to leave until the vehicle has been brought to a stand.

They have a right to insist upon that, and, by availing themselves of this right, would be guarded and protected against a class of accidents which result from endeavoring to leave the car while it is in motion. The plaintiff was

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engaged in business as a manufacturing dressmaker, but the complaint contained no claim for damages because of his inability to continue to carry on this business after the accident. But the plaintiff was allowed to prove, subject to the objections and exceptions of the defendant, that the evidence was irrelevant and immaterial, and directed to special damages not alleged in the complaint, that he was prevented by the disability the accident produced from carrying on the business. These objections were well taken, and it was error to allow this evidence under the form of the complaint, to be given by the plaintiff.

Objections were also taken, and have been prominently urged in support of the appeal, to evidence as to the rate of speed that the cars of the defendant were propelled at in passing around curves. This evidence, if it stood solely on the objections taken to it, would also result in setting aside the judgment, for it had no bearing whatever upon the management of this car at the time when the plaintiff left it and the accident occurred. But before this evidence was given, the defendant itself had given evidence to the effect that the cars never passed over a curve in the manner described by plaintiff, and to meet that as a part of the defendant's defense, the plaintiff had the right to resort to this proof. But, upon the other parts of the case, the defendant has a legal right to complain. And the judgment should be reversed, and a new trial ordered, with costs of the appeal to the defendant to abide the event.

VAN BRUNT, Ch. J., concurs; BRADY, J., concurs in result.

THEODORE SELIGMAN *et al.*, Respondents, v. THE FRANCO-AMERICAN TRADING COMPANY, Appellant.

Supreme Court, First Department, General Term, May 24, 1889.

Judgment. Confession.—Where a judgment entered by confession contains no statement of facts from which the justice of the plaintiff's claim can be seen, and the plaintiffs fail to furnish, on demand, evidence that the amount allowed was a just and legal obligation against the judgment debtor, a receiver representing a judgment creditor may move to vacate such judgment though entered before his appointment, and is entitled, on motion, to a reference, on which proof can be required to be given by the judgment plaintiffs, or on their behalf, to establish their right as against the defendant, to the amount entered in the judgment, or to some portion of it; and if the amount has been overcharged, the judgment should be reduced accordingly.

Appeal by the receiver of the property of the defendant, from an order denying a motion to vacate a judgment entered on confession.

O. J. Wells, for appellant.

George W. Seligman, for respondents.

DANIELS, J.—The judgment was confessed on the 5th of October, 1888, for an indebtedness stated to be owing to the plaintiffs for professional services as the defendants' attorneys and counsel, and on the twenty-sixth of December of the same year, the plaintiff was appointed receiver of the property of the defendant at the suit of a judgment-creditor, whose execution had been returned unsatisfied.

The statement for the judgment was drawn with very great brevity, barely complying, if indeed it did comply, with what has been directed to be stated in it, to render it

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legal and regular, by subdivision 2, section 1274 of the Code of Civil Procedure. That subdivision requires that the statement must show that the sum confessed is justly due, or to become due, while the statement itself contains no more than that the plaintiffs, as defendants' attorneys and counsel, had general charge and conduct of its legal affairs, and rendered services from the 1st of January, 1884, to the 1st of October, 1885, of the reasonable value of \$2,500. The receiver considering that the statement was too deficient to comply with this direction of the law, or that the amount allowed was greater than the value of the services rendered, applied to vacate or set aside the judgment, after endeavoring to obtain a further statement disclosing the justice of the amount allowed by the judgment.

To defeat the application, the plaintiffs have taken the position that the receiver was not authorized to make it, and the case of *Whittelsey v. Delaney* (73 N. Y. 571), has been brought to the attention of the court, as an authority sustaining this position. But that case is entitled to no such weight or effect. For there the action was brought to vacate a judgment on the ground that it had been fraudulently recovered, and the court held that an action by the receiver was there necessary to secure that relief. In this respect it followed the decision made in *Tracy v. First National Bank, etc.* (37 N. Y. 523), which decided that a receiver could not move to vacate an attachment, as the law then existed, without first making himself a party to the action.

But the judgment, against which the receiver in this case endeavored to obtain relief, was entered on confession, and it has been the practice of the courts at all times to interfere in the way of vacating, modifying, or reducing such judgments, by way of motion, and at the instance of other parties whose interests or rights may be shown to require protection against the judgment; and accordingly a subsequent judgment-creditor was permitted to move to vacate

the preceding judgment by confession, and that judgment was set aside on his application, in *Chappel v. Chappel* (2 Kernan, 215). And the principle upon which that decision was made is supported in *Read v. French* (28 N. Y. 285). A judgment entered upon the confession of the defendant stands upon different grounds from one recovered by an actual adjudication of the court, and will not be allowed injuriously to defeat or postpone the legal rights of other parties.

The receiver appointed in this case represented a judgment-creditor, and being vested with his rights, was authorized, under these authorities, to make this application; and from the very brief, if not materially defective, statement made for the plaintiffs' judgment, he was justified in moving to vacate it, or to secure such an investigation concerning the amount mentioned in it as would prove the plaintiffs to be entitled to its allowance. And this rule applies with peculiar force to transactions between attorneys and clients. The relation is of a confidential character, and liable to be used by the attorneys for their advantage, to the prejudice of the parties employing them, as well as of other creditors. And to sustain transactions between the attorney and client, actual proof of good faith and fair dealing has been required by the law; and to promote that, the receiver was entitled to a statement supported, at least, by the evidence of the attorneys, showing that the amount allowed by the judgment was a just and legal claim against the defendant. That they failed to furnish, and as the judgment contains no statements of facts from which the justice of the plaintiffs' demand can be seen, a reference should be ordered, upon which proof should be required to be given by them, or in their behalf, to establish their right, as against the defendant, to this sum of money, or to some portion of it, and if the amount has been overcharged, then the judgment should be correspondingly reduced.

The order from which the appeal has been taken should

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be reversed, with ten dollars' costs and the disbursements, and an order entered directing this reference.

VAN BRUNT, Ch. J., concurs; BRADY, J., concurs in result.

**JULIUS TUCHBAUD, Appellant, v. CHICAGO AND ALTON
R. R. Co., Respondent.**

Supreme Court, First Department, General Term, May 24, 1889.

1. *Summons. Service of.*—Where the service of a summons and complaint is made upon a foreign corporation, by delivering a copy thereof to the managing agent of the company, the papers must show that the defendant has some property within the state at the time of the service, from which the plaintiff may have some chance of benefit. This is sufficiently established by proof that the defendant is the lessee of the office where its business is carried on, and owns the office furniture therein.
2. *Same. Managing agent.*—A person who is described in the tables of a foreign railway corporation as "general agent" is a managing agent of the company within the meaning of the provisions of subd. 3 of section 432 of the Code.
3. *Appeal. Special appearance.*—An attorney, who appears for the purposes of a motion, remains the attorney sufficient to receive notice of appeal.

Appeal from an order vacating the service of summons and complaint.

Henry Schmitt, for appellant.

L. A. Gould, for respondent.

VAN BRUNT, P. J.—This action was brought to recover for a cause of action arising in the state of Missouri. The defendant is a foreign corporation, and the service of the summons and complaint herein was made upon Mr. Charles Oberg, who is claimed to be the general agent of the said company in New York. A motion was made to

set aside the service upon the ground that the person served was neither the president, secretary, cashier or director of the company, and that the corporation had no property located within this state. The learned court granted the motion, and from the order thereupon entered, this appeal is taken.

It appears from the opinion rendered upon the decision of the motion that the court was of the opinion that the person served was a managing agent, within the meaning of that term as used by the Code, but there was no evidence that the defendant had property within the state at the time of the service of the summons and complaint.

The position in respect to the managing agent is clearly upheld by the decision in the case of *Palmer v. Pennsylvania Co.* (35 Hun, 370), and it is not necessary to discuss further that proposition.

It is undoubtedly true that the papers must show that the defendant has some property within the state at the time of the service, from which the creditors may have some chance of benefit. The allegation in the affidavit of the plaintiff is that the defendant has a large business in the city of New York, and has property within the state of New York, and as affiant, is informed and believes, had property in the state of New York at the time of the service of the summons and complaint; that they had at that date their offices in the city of New York, and owned the furniture of said offices, and the tickets, and they also had cars of the defendant's road, within the jurisdiction of the court. The answering affidavits upon the part of the defendants in support of their allegation that there was no property within the state, simply allege that the office in which the business of the defendant is carried on is hired by the freight department, and that the passenger agency which was under the charge of said Charles Oberg, and with which department the affiant had nothing to do, kept a small portion of said office, which was partitioned off for its use.

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There is no allegation in this affidavit that the defendant road is not the lessee and liable for the rent. Neither is there any allegation that it does not own the furniture in said office. The mere statement that this office is hired by the freight department of the company shows upon its face that the defendant is the lessee, because it is liable for the contracts of each of its departments. This being the case, it is apparent that there is an admission upon this record that it does own the office furniture situated within this state, and that it is the lessee of this office, and that its business is there carried on.

It would be a strange proposition that a foreign corporation may bring its property within this state, carry on business within this state, and enter into contracts within this state, and then claim exemption from the laws of this state, upon the ground that it has not all its property within this state.

We think it is clear from these affidavits that the defendant has property within this state from which the creditors may have some chance of benefit, and, therefore, the service was brought within the rule.

The order should be reversed, with ten dollars costs and disbursements.

It is sufficient to say with respect to the motion to dismiss the appeal, that such motion is absolutely frivolous. The result of the position of the defendant, if sustained, would be that no matter how erroneous the decision of the court below might be, there could be no possible appeal from such order, because there was nobody upon whom to serve the notice of appeal.

Where an attorney appears for the purposes of motion, he still remains the attorney sufficient to receive notice of appeal, and the corporation has so far at least submitted itself to the jurisdiction of the court.

The motion should be denied, with ten dollars costs.

DANIELS and BRADY, JJ. concur.

PAUL WILLIAMS, Appellant, v. WILLIAM HAYS, Respondent.

Supreme Court, First Department, General Term, May 24, 1889.

Appeal. Stay.—A motion for a stay of an action until the hearing, upon appeal, of a case pending in another court invokes the exercise of the discretion of the court, and, when it has been fairly and properly exercised, a denial of the motion will not be disturbed.

Appeal from so much of an order as denies a motion for a stay of the action, pending an appeal in another action to the general term of the superior court.

George A. Black, for appellant.

Goodrich, Deady & Goodrich, for respondent.

MACOMBER, J.—The decision upon the appeal by the plaintiff from an order permitting the appellant to file a supplemental answer (23 N. Y. State Rep. 489), alleging the result of the trial in the superior court of the city of New York, in the case of *Hays v. The Phoenix Insurance Company*, practically decides this motion also. That portion of the order, not appealed from, granted a stay pending this appeal, and properly denied a stay until the hearing upon appeal of the case pending in the superior court of the city of New York in the action brought by this defendant against the insurance company. Such stay was obviously all the court should have granted, and the discretion of the court seems to have been fairly exercised, and should not be disturbed.

Order appealed from affirmed, with costs.

VAN BRUNT, Ch. J., and BARTLETT, J., concur.

Statement of the Case.

In the Matter of THOMAS S. KING, Police Justice of
Buffalo.

Supreme Court, Fifth Department, General Term, June, 1889.

1. *Police justice. Jurisdiction.*—The power of the mayor of Buffalo to remove a police justice for misconduct does not deprive the supreme court of like jurisdiction.
2. *Same. Charge. Specification.*—In proceedings for the removal of a police justice, a specification cannot extend over a period of time which the charge itself does not cover; and conduct prior to the time specified in the charges cannot be made the subject-matter of removal thereunder.
3. *Same.*—It is not sufficient cause for his removal that, from passion and prejudice, he adjourned a bastardy case for some time and kept the defendant in jail in the meantime, where no objection was made to the adjournment and extenuating circumstances appear.
4. *Same.*—Nor is the malicious utterance of slanderous language from the bench regarding the mayor, and the county judge, a sufficient cause of removal; nor the suspension of sentence on a prisoner convicted of assault and battery.
5. *Same.*—Objection to the appointment of policemen for his court and to their attendance does not constitute serious misconduct.
6. *Same.*—Nor does his statement in a return to an appellate court, that the attorney taking the appeal was a "penitentiary outcast and legal pirate," being true, constitute an offense.
7. *Same.*—It is only such a violation of duty as directly tends to prejudice the maintenance of public justice, or a reckless exercise of functions accompanied by an indifference to considerations of right and wrong, which present sufficient cause for removal. Mere reckless private speech and defamation of character, which have no connection with the discharge of his judicial functions and do not affect, in the least, the administration of his office, do not constitute sufficient ground.

Application for the removal of Thomas S. King from the office of police justice of the city of Buffalo.

Adelbert Moot, for petitioner.

Daniel N. Lockwood and *William B. Hoyt*, for respondent.

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MACOMBER, J.—This is an application for the removal of the respondent from his office as police justice of the city of Buffalo, upon the ground that, as stated in the charge contained in the petition, he has been guilty of serious misconduct in office and flagrant neglect of duty.

Counsel for the respondent, by a supplemental brief filed since the oral argument was had, makes the point that this court has not jurisdiction in the premises.

By the charter of the city of Buffalo as it now exists (chapter 519 of the Laws of 1870, tit. 2, § 24, as amended by chapter 17 of the Laws of 1886), the power of removal of the police justice is given to the mayor of that city. The language of the section of the act conferring this power is as follows:

“He shall also have power to suspend or remove such officers, whether they be elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of removal, but no such removal shall be made without reasonable notice to the officer complained of and an opportunity afforded him to be heard in his own behalf, etc.” The officers therein referred to include the police justice of that city.

The existence, however, of such power, lodged in the hands of the mayor, does not deprive this court of like jurisdiction, provided it has been conferred by the constitution and the laws. By section 18 of article 6 of the constitution of the state of New York, “justices of the peace, judges and justices of inferior courts, not of record, and their clerks, may be removed, after due notice and an opportunity of being heard by such courts as may be prescribed, for cause, to be assigned in the order of removal.”

In pursuance of this constitutional provision conferring the power of removal upon such courts as the legislature may designate, the Code of Criminal Procedure, section 132, enacts as follows: “Justices of the peace, police justices, justices of justices’ courts and their clerks are removable by

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the supreme court at a general term." We have, therefore, an article of the organic law conferring upon such courts as may be prescribed by law the power of removal, for cause, of officers of this description. The police court for the city of Buffalo is clearly an inferior court not of record named in the constitution.

If the power given to the mayor of the city of Buffalo to remove the police justice is constitutional, a question which we do not pass upon because it is not before us, the result is that the police magistrate of that city is amenable to two tribunals, the one judicial and the other executive, clothed with power, for proper cause, to remove him from office. This court, however, cannot be ousted of its jurisdiction by any power given by the legislature to the mayor, for the reason that our power is derived directly from the constitution, and is not dependent upon a statute alone, except in so far as the statute already quoted designates the particular court which shall exercise such power. We are constrained, therefore, to examine this case upon its merits.

Following the general course pursued in courts martial and courts of impeachment, the respondent is accused in one general charge, to which there are subjoined fourteen specifications of offenses; the last specification containing in itself six subdivisions. The charge is "that Thomas S. King, of said city, who now is, and all of the times hereinafter mentioned has been, police justice of said city, has, as such police justice, since his present term of office began, been guilty of serious misconduct in office, and flagrant neglect of duty, and most respectfully submits the following amended specifications of such charge, etc."

Upon filing the answer of the respondent, an order of reference was made, to take the testimony pertaining to this charge, and these specifications, with directions to the referee to report the same, with his opinion thereon, to this court. The learned referee was probably not authorized to make, and accordingly has not made, any recommendation

in his report or opinion touching the propriety of the removal of the respondent from office.

He has found, as a fact, that specifications 1, 2, 3, 4, 5, 6, 9, 10, 12, and items 4, 5 and 6, being subdivisions of specification 14, have not been proven. The petitioner's counsel raises no question in regard to this part of the referee's report; consequently, the accusations covered by those specifications enumerated above need not be considered.

Item No. 1 of specification 14 charges that on or about the 11th day of November, 1886, Mr. King ordered one Edward Cutter, a newspaper reporter, to be arrested and placed in the prisoner's box, charged with contempt of court, though said Cutter had not by word or deed been guilty of any contempt of court. We are unable to consider the evidence of this specification, for the reason that it was not properly admitted under the charges made against Mr. King.

The office of a specification is to make particular a general accusation contained in the charge proper. It cannot be extended over a period of time which the charge itself does not cover. In this class of proceedings the charge is designed to be general in its terms, but still the time within which the supposed offense had been committed is required to be stated. The charge in the indictment against Mr. King is that he has been guilty of misconduct in office "since his present term of office began." His present term of office began on the 1st day of January, 1887, and consequently his conduct, on the 11th day of November, 1886, towards Mr. Cutter, cannot be made the subject-matter of his removal under this charge. *Conant v. Grogan*, 6 N. Y. State Rep. 322.

So, also, of item No. 2 of specification 14, which relates to the treatment of Charles E. Stilwell, Esq., by the respondent.

Mr. King is here charged with wilfully, falsely and maliciously committing to the common jail of Erie county, this

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gentleman, for what was alleged to be a contempt of court. This misconduct is alleged to have occurred on the 12th day of December, 1884, upwards of two years before the present term of Mr. King's office began. We are not permitted to consider this specification either, for the reasons above stated, namely, that it is not embraced in the general charge against Mr. King.

The other specifications, some of which the referee has found to be fully, and others partially proven, will be considered in their order.

SPECIFICATION NO. 7.

On September 26, 1887, one Sarah Spielberger made information in bastardy against John Teitlebaum, and the overseer of the poor made application for an inquiry, upon which a warrant was issued for the arrest of Teitlebaum, who was brought into court on the twenty-ninth day of September, three days afterward. Teitlebaum and Sarah Spielberger were foreigners, and did not speak English sufficiently well to be easily understood. The complainant was represented by a man, who though not an admitted attorney, practiced quite extensively in the police court of Buffalo. Teitlebaum had no counsel. It was impossible for the fact to be definitely ascertained, at the time of this examination, whether the complainant was actually pregnant or not; and her counsel, therefore, asked that the case be postponed to await developments, until such time as such facts could be accurately determined. At his request, the police justice adjourned the case until the 27th day of November, 1887. Teitlebaum was accordingly committed for further examination in default of \$300 bail, in which he was held by the magistrate. At the time this adjournment was had, Teitlebaum neither consented nor objected to the postponement, nor did he object to the commitment, nor does it appear that he was advised of his

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legal rights, or that he clearly understood what was being done. After lying in jail about a month, the services of Mr. E. A. Hayes were obtained, who made attempts, during a period of one week or so, to make a settlement of the case between the parties, but did not meet with success. During all this time the justice told Hayes that Teitlebaum could go out of jail at any time when he should produce \$300 bail. Hayes tried to get such bail, but failed.

At the adjourned day, November 27, 1887, another attorney, Fritz Voges, asked, in behalf of Teitlebaum, that the justice should try him speedily. On that day the parties appeared, but Mr. Slayton, the counsel for the girl, objected to proceeding at that time, and the case was adjourned. Again the counsel asked either for the trial or discharge of Teitlebaum. Mr. Slayton, in behalf of the prosecution, appeared for the girl, who was not present, and objected to proceeding, charging that the accused himself had been instrumental in keeping the girl away from court. Mr. Voges then demanded of Justice King a trial of the accused, and the justice replied from the bench that he (Voges) "could not bulldoze him; that he would keep him (Teitlebaum) in jail until he got ready to bring him over." Subsequently Teitlebaum was properly discharged by the county judge of Erie county upon a writ of *habeas corpus*. This just and fair judicial action, on the part of the county judge, irritated the police justice to such an extent that he was guilty of violence in word and manner, as stated.

The police justice had not the power to adjourn the hearing of that case from September twenty-ninth to November twenty-seventh, upon the request of the complainant, nor of his own motion, and to commit the defendant in the meantime in default of bail. Code Crim. Pro., sections 838-860.

No pretense is made that there was an absent witness, or that all of the evidence was not then in court. No incon-

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venience was alleged to the prosecutor or his attorney. It was an arbitrary adjournment of two months, for the reason that the evidence which the complainant was obliged to give in order to make out the charge of bastardy, could not be forthcoming until an actual state of pregnancy could be shown by medical evidence. At that time it was not known, and could not have been definitely ascertained, whether the defendant could, at any time, be properly restrained of his liberty by reason of his relations with this woman. This referee has found that this action on the part of the police justice was influenced by partiality, passion and prejudice.

In considering the question whether this act and the finding of the referee would justify us in actually removing the magistrate from office, we ought to, as the referee has done, take into consideration the character and nature of the case, and the course of procedure generally existing in police tribunals.

The cases coming before this magistrate are mostly of a petty and vexatious character, arising among a low and abandoned class of society. The disposition which is to be made of such persons when brought before him requires a wide discretion to be reposed in the magistrate. In this particular instance, although the police justice acted, as has been found, from "passion and prejudice," yet such action was inspired largely by a not unnatural indignation which he, as a man, felt at the treatment which he believed the woman, Spielberger, had received at the hands of Teitlebaum. She had been seduced by him; he had obtained what little money or property she possessed, and then he brutally turned her off. After having ruined her in reputation and estate, he, with a refinement of cruelty, told her to go and lead the life of a public prostitute.

Under these circumstances, and upon the ground that no objection was made to an adjournment of the hearing for two months, we do not think this specification, though

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shown to be true in substance, would justify us in removing the respondent from office.

SPECIFICATION No. 8.

This specification is to the effect, that after the discharge of Teitlebaum mentioned above, the respondent was guilty of rash and intemperate language, not only against the county judge of Erie county, but against the mayor of the city of Buffalo, declaring that they should be impeached and removed from office. This language the referee has found was the result of spite and malice cherished by King toward the officials named. The charge against these public officers was unjust in the extreme and maliciously false. The words were uttered from the bench, but it was the bench only of a police justice, who after years of association in that capacity with the criminal classes, has acquired violent and extravagant modes of expression, for the manifest reason that that was the only language which his auditors clearly understood. The words were clearly slanderous, and the speaker could not be relieved from the consequences thereof by reason of the fact that he was a magistrate. They were not uttered in the discharge of his official duties, and he was consequently amenable to the persons traduced to respond in a civil action, and to criminal indictment also.

We do not think that the words are sufficient to justify us in the removal of the officer ; nor do we think that such a conclusion was contemplated by the provision cited from the constitution of this state, by which, upon the removal of such officer, the reason shall be given therefor. If we should remove for this offense, the order would necessarily allege that the removal was made for slanderous words spoken by the police justice concerning public officers, and not for any official act.

SPECIFICATION No. 11.

By this specification Mr. King is charged with suspend-

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ing sentence on one Ward, convicted of assault and battery, after giving the prisoner a sound lecture. The referee is unable to say that the discharge of this man was not in the interest of the parties and of society. The only serious element in this specification is the contemptuous and disrespectful reference which the police justice made to worthy public officials.

SPECIFICATION NO. 13.

Prior to December 16, 1887, two policemen, by the name of Swan and Lyons, had been detailed for duty in the police court. On the last named date others were substituted for them by the board of police commissioners. Mr. King complained of this change, alleging that he was not consulted in the selection of the new officers and did not wish their services, stating to the police commissioners that they could assign them to different duty, which they might have for them elsewhere, but he did not wish their services and could get along with an interpreter or an occasional appeal to the public to maintain order; that if the board had any other duty for these men, the taxpayers might have saved some expense. About two months after this time the police magistrate rebuked one of the policemen so assigned to his court, for directing a bystander to take his hat off, and directed the officer to tell the commissioners that he (the magistrate) did not want him there.

This specification, though found to be proven, does not come up to the allegation made in the petition of "serious misconduct" on the part of the respondent in office.

ITEM 3 OF SPECIFICATION 14.

A person by the name of Wepel, or Whipple, had been convicted, by the police magistrate, of petit larceny, and an appeal had been taken to the court of sessions of Erie

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county from the judgment of conviction. In the return, which the respondent was required to make, he used the following irrelevant language :

“ The undersigned further states that if he is not mistaken in the handwriting in the body of the annexed affidavit, the same was drawn up by a certain penitentiary outcast and legal pirate, who has made a practice of hanging around the police court and penitentiary, seeking whom he might devour, and persuading ignorant persons to pay him a paltry stipend to procure an appeal when he knows there is no cause for a reversal of the judgment of the court, often causing them to unwittingly commit perjury.”

This language is charged in the specification to have been wilfully and maliciously uttered, with intent to injure and disgrace the attorney referred to. The evidence, however, discloses the fact that the attorney so criticised had, between the months of June, 1879, and April, 1887, been arrested thirty-one (31) times for intoxication, and once for false pretenses, and had been committed twenty-three (23) times out of such number to the Erie County Penitentiary, in default of payment of the fine imposed. While at the penitentiary he plied his vocation and induced persons to employ him to undertake their release from confinement, in some of which cases he was successful, and others of which he was not.

The referee has substantially found that the statement so incorporated in the return to the appellate court, was wilfully and maliciously done with intent to disgrace the attorney. But he is not able to find that the same was false.

Under the circumstances, his statement being true, and the attorney being a man of no character from his own showing, we do not think that the police magistrate committed any offense, except against good taste and judicial dignity. Such attorneys as the police justice has described are, unfortunately, too numerous around petty courts in our

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large towns, and the rebuke herein contained is not altogether untimely, though out of place.

This completes our examination of the charge, and of so much of the several specifications which the referee has found from the evidence to have been proven. On the whole, not deeming ourselves empowered to consider the cases of Stillman and Cutter, we have concluded therefrom, that the respondent is not guilty of any act which would require us to remove him from office. There has been no charge of corruption against the accused. The accusations against him of intoxication while upon the bench were not established, and were not insisted upon at the argument. While it is impossible for us not to take into the account the fact that the evidence before us relates to the official conduct of a petty judicial officer, and not to that of a judge of a court of record, yet even in this case an intentional violation of duty by the police magistrate, though unaccompanied by actual corruption, might be a sufficient reason for his impeachment and removal from office, provided such conduct were of a character to demoralize or injure the administration of justice, and bring his court into public contempt. But it is not every violation of duty which would justify removal; it is only such a violation as directly tends to prejudice the maintenance of public justice, which should lead to that end. Furthermore, even though the case did not rise to an intentional malfeasance in office, yet, if there appeared to be clearly established a reckless exercise of functions by the respondent, accompanied by an indifference to considerations of right and wrong, a sufficient cause would be presented for his removal upon this ground also.

This proposition, however, should not be confounded with mere reckless private speech and defamation of character, which have been indulged in by the respondent, and which have no connection with the discharge of his judicial functions, and are not shown to have affected, in the least, the administration of his office. The slanderous words

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spoken while on the bench were inspired and uttered, not while engaged in the discharge of his judicial functions, but rather as a private citizen, for which he is amenable to the persons injured. Being limited, as we are, to proof of his acts between the first day of January, 1887, and the time of the filing of this petition, we think no sufficient ground has been shown for the removal of the respondent.

The application should, therefore, be denied, and the petition dismissed.

All concur.

M. DELANCY BELLOWS, Superintendent, etc., v. DAVID COURTER, Overseer, etc.

Supreme Court, Fifth Department, General Term, June 22, 1889.

Poor and poor laws.—In order to sustain an action brought under the provisions of sections 59, 61, title 1, chapter 20, part 1, R. S., the statute requires that the person removed or removing must be a pauper at the time of his removal to the county in whose behalf the proceeding is taken.

Motion made by plaintiff for a new trial on a case and exceptions ordered to be heard in the first instance at general term.

J. B. Hammond, for the motion.

J. W. Dunwell, opposed.

DWIGHT, J.—The action was by the superintendent of the poor of the county of Seneca against the overseer of the poor of the town of Macedon, in Wayne county, to recover the expenses incurred by the former county in furnishing temporary relief to the family of one H. E., then and for nearly a year before that time resident in the town of Tyre

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in Seneca county. H. E. came from Macedon where he had lived two years, during which time, and while in Tyre, until his application for the relief above mentioned, he had always supported himself and his family by his labor. At the time of that application his wife had just died, after giving birth to twin boys; he had no accumulated property and found himself without means to bury his wife and provide for the immediate wants of his six children, the eldest of whom was twelve years of age. The plaintiff, as superintendent of the poor of Seneca county, having furnished the needed temporary assistance, served upon the predecessor in office of the defendant, as overseer of the poor of Macedon, a notice in which he described H. E. and his children as seven paupers who had come or strayed or been improperly sent or brought from the town of Macedon in Wayne county, into the county of Seneca, without legal authority or right, with the effect and intent to make the county of Seneca chargeable with their support.

And he notified the defendant's predecessor forthwith to take charge of such paupers and remove them to his town and county, and pay the expense of such notice and of the support of such paupers. The defendant's predecessor responded by denying "the supposed improper removal of H. E. and his six infant children, in the manner and with the intent alleged in said notice," and the plaintiff thereupon brought this action, alleging in his complaint that H. E. was a pauper when he "came, or strayed, or was improperly brought" from Macedon to Tyre.

The fault of the plaintiff's case, as made on the trial, was that the last mentioned allegation was not only not established but was admitted to be false. When H. E. removed from Macedon he was not a pauper, and never had been. He was a self-supporting citizen of Wayne county, with as good a right to select his residence and remove from one county to another as any other citizen of the state.

The attempt to charge the expense of the relief of his

family in Seneca county upon the town of Macedon, including the bringing of this action, was in supposed compliance with the provision of sections 59 to 62 of title 1, chapter 20, par 1, of the Revised Statutes (1 R. S. 628-9), as amended by chapter 546 of the Laws of 1885. For a better understanding of the scope and application of those provisions it may be useful to glance at some of the earlier provisions of the same title which, as enacted in the Revised Statutes, was apparently intended to contain a complete scheme for the care and relief of the poor of the state.

Section 24 (1 R. S. 620, provides for the determination by the board of supervisors of any county to abolish the distinction between town and county poor in such county. Section 28 provides that in all the counties in which such distinction is not abolished, "the poor having a settlement in any town in such county shall be supported at the expense of such town, and the poor not having such settlement shall be supported by the county in which they may be." Section 29 provides that residence in any town for one year shall constitute a settlement in such town.

Section 31 reads as follows: "No person shall be removed as a pauper from any city or town to any other city or town of the same or any other county, nor from any county to any other county, but every poor person shall be supported in the town or county where he may be, as follows:

First. If he had gained a settlement in any town in such county he shall be maintained by such town.

Second. If he hath not gained a settlement in the county in which he shall become poor, sick or infirm, he shall be supported and relieved by the superintendents of the poor at the expense of the county.

Third. If such person be in a county where the distinction between town and county poor is abolished, he shall, in like manner, be supported at the expense of the county, and in both the cases aforesaid proceedings for his relief shall be had as hereinafter directed.

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Fourth. If such pauper be in a county where the respective towns are liable to support their poor, and hath gained a settlement in some other town of the same county than that in which he may then be, he shall be supported at the expense of the town where he may be, and the overseer shall give notice in writing to the overseers of the town to which the pauper shall belong, requiring them to provide for the relief and support of such pauper.

The two following sections provide for the case of a controversy between the towns mentioned above as to the fact of settlement, and constitute the superintendents of the poor of the county a tribunal to hear and determine such controversy, whose decision shall be final and conclusive. And section 34 gives to the board of supervisors of the county power to levy a tax on the town against which the adjudication is made, to pay the expenses incurred by the town which has supported the pauper properly chargeable to the former.

Two things are made entirely clear by the provisions of the statute so far quoted :

First. That the question of the settlement of any poor person or pauper is to be considered, in determining the question of liability for his support, only as between two towns of the same county (which are liable for the support of their own poor), or as between such a town and the county to which it belongs; and, *second*, that every poor person who has not a settlement in some town of the county in which he becomes poor, must be supported or relieved at the expense of that county; and we shall see that these rules are not changed by subsequent provisions of the statute, even as amended by modern and short lived legislation.

Section 58 of the same title (1 R. S. 628) defines a misdemeanor. It consists of transporting, removing, or enticing to remove, any poor person from any city, town or county to any other city, town or county, without legal authority,

and there leaving such poor person, with intent to make the city, town or county to which he is so removed chargeable with the support of such pauper. The section also imposes a penalty for such act, to be recovered by the overseers of the poor of the town, or the superintendents of the poor of the county to which the pauper shall be so removed.

An essential element of the offense so defined is the criminal intent to subject a city, town or county not legally chargeable herewith, to the expense of the support of a pauper.

In the Revised Statutes these criminal and penal provisions were supplemented by the provisions of the four succeeding sections (sections 60, 61, 62 and 63), the purpose of which was to secure the return of the pauper to, and his support by, the town or county from which he had been so improperly removed or enticed, together with indemnity to the county to which he had been removed for its expenses incurred in his support while he remained therein, and in its proceedings to compel his return and future support. These proceedings included a prescribed notice to the proper superintendents or overseers, and, in default of the required action on their part, an action at law to enforce the liability imposed by the statute.

Such was the consistent and laudable scheme of the Revised Statutes to prevent or give redress for fraud by one political division of the state upon another, and so the statute continued to be until 1885, when, by chapter 546 of the laws of that year, an attempt was made to apply the provisions of section 59, and the subsequent sections cited above, to the case of paupers removing of their own accord from one city, town or county to another. In such case the element of criminal or fraudulent intent was not required to exist. It was only necessary that a pauper or person receiving public charity in one city, town or county, should, of his own accord, and, presumably, in the hope of bettering

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his condition, remove to another city, town or county of the state, to subject the political division from which he removed to the same liability as if he had been removed, or enticed to remove, under circumstances which would have made the act a misdemeanor on the part of the person or persons engaged in it.

It was under the statute, as thus amended, that this action was brought. The amendment was, happily, repealed by chapter 486 of the Laws of 1888. It may be very doubtful whether the repeal of the statute, which gave the supposed remedy by action in this case, did not put an end to all actions based upon its provisions, and not yet prosecuted to judgment. See *Butler v. Palmer* (1 Hill, 324); *Hughson v. Rochester* (17 N. Y. State Rep. 289). But it is not necessary to consider that question in this case. The amended statute did not cover the case, for the reason suggested in the outset of this opinion, and which was the ground upon which the judge at the circuit granted the nonsuit, viz.: that H. E. was not a pauper when, in the exercise of the commonest right of a citizen, he removed from the county of Wayne to the county of Seneca. The language of the statute (section 59) as amended, is: "any pauper so removed, brought or enticed, or who shall, of his own accord, come, or stray from any city, town or county, into any other city, town or county, not legally chargeable with his support, shall be, etc." This language, consistently with the whole tenor and evident purpose of the statute, shows that the person so removed, or removing, must be a pauper at the time of his removal to the county in whose behalf the proceeding is taken.

We are clearly of the opinion that the nonsuit was properly granted, and that the motion for a new trial must be denied.

Motion for new trial denied, and judgment ordered for the defendant dismissing the complaint.

All concur.

SIDNEY U. SMITH, Respondent, v. SAMUEL C. SMITH,
Appellant.

Supreme Court, Fifth Department, General Term, June 22, 1889.

Principal and agent. Payment.—A debtor does not pay his debt by furnishing the money to his agent for the purpose of paying it, if the money never comes into the hands of the creditor; and the latter is not to be a loser by a diversion of the fund.

Appeal from a judgment entered upon a verdict directed by the court.

I. W. Near, for appellant.

F. H. Robinson, for respondent.

DWIGHT, J.—The action was for money lent. The plaintiff's father, Sidney Smith, who was also the defendant's brother and more or less in his employ, collected for the plaintiff, under a special power of attorney for that purpose, the sum of \$505, and, without authority of the plaintiff, lent it to the defendant as the money of the plaintiff. This was on the 1st day of June, 1886. The plaintiff subsequently ratified the transaction as a loan on call only, and the defendant recognized it as such. The next day after the loan the defendant set out for Kansas, to be absent for several weeks, and left his brother Sidney in charge of his business. Before he went he placed in his brother's hands two checks, together representing the amount of the loan, evidently to enable his brother to draw the money for the plaintiff if he should call for it while the defendant was gone. During his absence his brother borrowed money from another son, Selah, for use in the defendant's business—among other things to pay the plaintiff \$100 on his loan; so that, as he wrote the defendant, he might hold the check as long as he

could which he promised to do. It serves to show how fully the plaintiff's father was acting in these matters in the interest of the defendant that, in the same letter, he asked the defendant to send him a check for the amount of Selah's loan and promised to hold that, also, for the present.

Soon after the return of the defendant, his brother presented to him a statement of the plaintiff's loan, in which he charged the latter with the \$100 paid him out of Selah's money, and with thirty-two dollars, which he, the plaintiff's father, had had, for what use does not appear. The statement showed a balance due to the plaintiff, including interest, of \$375.37, and for this sum the defendant gave to his brother two notes payable to the order of the latter, at bank, in thirty days, one for \$300, the other \$75.37.

The defendant testifies that when he went to the bank to pay the notes, he found that the smaller one "had been used." Being produced as evidence by the defendant, it appears to have been endorsed by his brother, and "paid August 9th." He testifies that he gave his check to the order of his brother to pay the larger note, and that check is produced; it bears the indorsement of the payee and is stamped "paid August 18th." There is no other evidence than this of the payment of the notes.

The plaintiff received from his father \$200 in all toward the payment of his loan; the payments being severally \$100, \$25 and \$75. For the balance of \$305, with interest, the verdict in this action was directed in favor of the plaintiff.

The foregoing statement summarizes all the evidence of importance which was given in the case. At its close the defendant asked for the direction of a verdict in his favor, which was denied. He did not ask to have any questions submitted to the jury, but excepted to the refusal of the court to direct a verdict in his favor and to the direction, which was given.

The only question presented to the court below was

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whether, on the facts of the case, payment to Sidney Smith was payment to the plaintiff. That question, we think, was properly disposed of, for the obvious reason that in all the matter of procuring the loan and making payments thereon, the plaintiff's father acted as the agent of the defendant. The finding of that fact, we think, was necessitated by the evidence; certainly there was evidence sufficient to support it, and it was not requested to be submitted to the jury. That fact being found, the plaintiff was entitled to a verdict. The defendant could not pay his debt by furnishing the money to his agent with which to pay it; and the plaintiff is not to be a loser by a diversion of the fund.

There seems to be nothing else in the case requiring attention.

The judgment should be affirmed.

All concur.

JOHN BROEZEL, Jr., *et al.*, Appellant, v. CITY OF BUFFALO,
Respondent.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Municipal corporations. Assessments.*—A preliminary resolution of the common council of the city of Buffalo, declaring that the proceedings are for the purpose of extending a certain street, and giving the lines of such extension to the termini of such line, is a sufficient compliance with the requirements of the charter of the city of Buffalo.
2. *Same.*—Where the notice of application for the appointment of commissioners states that such application will be made for their appointment, "to appraise such lands and property," it is also a sufficient compliance.
3. *Same. Proceedings, when not void.*—The proceeding, in an action brought by property owners, will not be vacated on the ground of irregularity, where there was no change in the description of the lands assessed to any of them.

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Appeal from an order of the special term dismissing the complaint upon the merits, in an action brought to vacate and set aside, as a cloud upon title, certain local assessments levied upon plaintiff's lands in extending Ellicott Street, in the City of Buffalo.

George Clinton, for appellants.

M. F. Worthington and *Frank C. Laughlin*, for respondent.

MACOMBER, J.—The common council of the city of Buffalo, on the 28th day of May, 1883, passed an ordinance for the acquisition of lands necessary to extend Ellicott street from the southerly line of Seneca street to the northerly line of Exchange street, particularly describing the same.

This resolution having been approved by the mayor, the city did, on the 2d day of June, cause to be published in the official newspaper of the city, such notice of intention as was declared by its resolution, which notice was published on the 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th and 16th days of that month, the 10th and 17th being Sundays. On the 18th day of June the common council passed a resolution of determination to take the lands above mentioned.

It is urged by the learned counsel for the appellants that the original resolution of intention, and the subsequent resolution of determination to take the lands, were insufficient to give jurisdiction to the superior court of the city of Buffalo, which subsequently, by proper proceedings, condemned the lands in pursuance of the provisions of the city charter, inasmuch as the same do not specifically declare the use and purpose for which such lands are to be taken.

This contention seems to us to be rather a verbal criticism upon the language of the resolution, than an objection going to the merits. The preliminary resolution declared that it was for the purpose of extending Ellicott street, giving the lines of such extension to the termini of such lines. This

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is all that could be required, under the provisions of the charter, which provide that the purposes for which lands shall be taken shall be stated in the resolution.

On the 8th day of December, 1883, the counsel for the defendant, in pursuance of notice duly given, made an application in behalf of the defendant, upon due proof, for the appointment of commissioners to ascertain and report the just compensation to be paid to the owners and persons interested in the lands, and property to be taken and appropriated for laying out said street. Such is the finding of the trial judge. The language of the notice, however, was that the application would be made for the appointment of commissioners "to appraise such lands and property." This also seems to us to be a mere verbal criticism upon the notice. The commissioners proceeded, and did make what appears to be an award of just compensation to the owners and persons interested in the lands, in accordance with the law and substantially in accordance with the notice of motion.

It is further contended, in behalf of the appellants, that the proceedings were irregular and void, because changes were made in the description of lands which had the effect of taking from the assessed property lands which had been before assessed, and that in some cases lands not originally assessed were added to the roll, while the amounts originally assessed upon the different pieces of property were not changed. The fourteenth finding of fact, however, of the learned judge completely disposes of this proposition. Irregularities, it is true, had crept into the assessment roll, as they are very likely to do in proceedings of this character. The board of assessors, in pursuance of section 38 of title 7 of the city charter, undertook to, and actually did, correct such errors, but they did not strike out the assessment against any property contained in the roll, as originally presented to the common council by the city attorney, in which the plaintiffs, or any of them, were interested.

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No name of a person or corporation assessed was changed, nor the amount assessed altered. No names were added to the assessment-roll after this time. The only change or alteration made by the board of assessors had reference solely to the description of the lands assessed, and, in the language of the finding: "In no instance was any change or alteration made in the description of any of the lands assessed to any of the plaintiffs to this action, but the changes or alterations made in the description were in respect to descriptions of lands assessed to others than these plaintiffs." This conclusion of fact is fully sustained by the evidence. The whole case shows that the assessors, in making and levying the assessment, assessed the whole amount ordered to be assessed upon the parcels of land benefited by the improvement, in proportion to such benefit, and that no one of the plaintiffs was affected by any mere correction of description which was made in the proceedings after they had been initiated.

The questions involved in the appeal, with a few exceptions, were thoroughly considered by the superior court of the city of Buffalo in these proceedings for the extension of Ellicott street, in an elaborate opinion, a copy of which has been furnished to us. The petition of the plaintiff Ferras was filed in that court before the bringing of this action, but while the petitions of all the other plaintiffs in this action were not presented in that proceeding until after this was begun, they were all considered by that court and disposed of by the decision and opinion already mentioned. While the judgment of the superior court is not a bar to this action, yet the cogency of the reasoning of the learned judge delivering the opinion would lead us to the same conclusion upon all the questions that were distinctively raised upon the proceedings for the acquisition of the land alone, irrespective of some facts which have been attempted to be shown *aliunde* in the action before us.

The questions not so specifically raised by the plaintiffs

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in their proceedings in the superior court, were fully considered by the learned judge who tried this action, who has written an opinion in which we fully concur.

The judgment should be affirmed, with costs.

All concur.

GEORGE C. BUELL *et al.*, Appellants, v. BENJAMIN F. VAN CAMP, Respondent.

Supreme Court, Fifth Department, General Term, June 22, 1889.

Attachment. Vacating.—The attaching party, where the moving party, on a motion to vacate an attachment, does not confine the facts alleged in his affidavit to the mere formal parts of the motion, but introduces new matter, will be allowed to read affidavits in support of the order.

Appeal from an order of the special term vacating the attachment on such motion.

Horace McGuire for appellants.

Sawyer & Bullard, for respondent, the Orleans Co. National Bank.

MACOMBER, J.—The motion to vacate the attachment, which had been procured by the plaintiff, was made ostensibly upon the papers upon which such order of attachment had been granted. The moving party, however, was not content, in making this motion, to confine the facts alleged in his affidavit to the mere formal parts of the motion. On the hearing of the motion, after the reading of the moving affidavits to set aside the attachment, the plaintiffs' counsel, claiming that the moving party had introduced new matter, procured and offered to read affidavits in support of the original order of attachment. This was denied him, as being inadmissible, the court holding that the motion was

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made solely upon the original affidavits upon which the order of attachment had been procured and not upon new matter. These facts bring up the main question in this case.

Had the moving party brought before the special term only the matters alleged in the original affidavits filed by the plaintiffs, the rule administered would undoubtedly have been correct; but it appears that other matters were introduced in such moving, papers of such a character as would permit the plaintiffs to read affidavits in support of the order. The attachment was granted to the plaintiffs upon the ground that the defendant had departed from the state of New York with the intent to defraud his creditors and to avoid the service of a summons upon him. The moving party, the Orleans County National Bank, caused to be inserted in the affidavits the facts that since the land had been advertised for sale under the judgment procured by the bank, the defendant Van Camp had confessed a judgment for about nine hundred dollars, and that he now resides on his farm, in that county, with his wife. These facts tended directly to show that Van Camp had not departed the state to defraud his creditors or to avoid the service of process upon him. They could have been introduced for no other purpose than to convey to the mind of the court the fact that he was still a resident of the county, and was within reach of the process of the court. This opened the way for the plaintiffs to read the supporting affidavits which they presented to the court.

The plaintiff's counsel also offered to read to the special term an affidavit to show what took place before the county judge when the attachment was granted, which was designed to show that the original affidavits of two witnesses, Jerome and Kelsey, were actually before the judge granting the order, and were acted upon by the judge, though copies of them only were attached to the affidavit made by one of the plaintiffs. The affidavits of those

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witnesses were not entitled in this action, it is true, but they were produced before the judge at the time of the granting of the order in question, and were considered by him at the time, as is shown by the rejected affidavit. This affidavit was also competent, and the appellant's counsel should have been permitted to read it. For these reasons, we think that the order appealed from should be reversed with ten dollars' costs and disbursements.

All concur.

SAMUEL BRYANT, Administrator, etc., Respondent, v.
TOWN OF RANDOLPH, Appellant.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Questions of fact. Contributory negligence.*—The question of contributory negligence is for the jury, where the evidence shows that the accident occurred, while the deceased was driving with a heavy load down a steep descent, and the testimony is conflicting as to whether his wagon had a brake, and whether he was in a position to use it.
2. *Same. Highway.*—That the defective highway was on land belonging to a railroad company, is a matter for the consideration of the jury.
3. *Same.*—The fact that the roadway had remained as constructed for more than 27 years, was not a defense necessarily, but was a circumstance which the jury should have been allowed to take into consideration in determining the question, whether the highway commissioner was, at the time, personally chargeable with negligence for which the town must respond.
4. *Pleadings. Answer.*—Where plaintiff unnecessarily alleges matter, the negative of which will constitute an affirmative defense, the defendant need not, in addition to a general denial, plead affirmatively the fact, to enable him to give evidence thereof.
5. *Town. Liability.*—It seems that a town, when defendant and liable for the negligence of the highway commissioner, will not be permitted to show, as a defense, a lack of funds for making repairs, or inability to raise them.

Opinion of the Court, by MACOMBER, J.

Appeal from a judgment entered upon a verdict, and also from an order denying a motion for a new trial upon a case and exceptions.

William H. Henderson, for appellant.

T. W. Stevens, for respondent.

MACOMBER, J.—The plaintiff, as administrator of the effects of his deceased son, George A. Bryant, brings this action to recover damages for the death of the decedent by reason of alleged negligence of the commissioner of highways of the defendant.

At the time of receiving the injuries, which resulted in the death of George A. Bryant, he was traveling upon the highway in the town of Randolph, near a point where the highway is crossed by the New York, Pennsylvania and Ohio railroad, but within the lines of the railway lands.

The highway had existed at this point for many years prior to the construction of the railroad. At the time of the building of the railroad, namely, in the year 1860, the railroad company undertook to carry the highway across its track at grade, but in doing so, it elevated the highway about twelve feet above its original and natural level. This caused a sharp incline in approaching the railroad from the south, and a correspondingly sharp decline in descending from the railroad tracks northerly. The decedent was riding upon a load of bark, weighing two tons and three hundred pounds. The traveled route which vehicles were required to take coming from the south had a sharp bend or curve to the right while approaching the track, and then an equally sharp turn to the left in descending, and in passing on to the village of East Randolph. While descending the grade on the north side of the railroad tracks, and while yet upon the railroad lands, at a point about thirty or forty feet north of the tracks, the load of bark was overturned to the left, and the driver was crushed.

The grade of the highway on the north side of the railroad track was eighteen feet to the hundred.

The maps introduced in evidence, together with the testimony, show not only the curve to the right in approaching the track from the south already mentioned, but also the reverse curve to the left, after attaining to the summit of the grade, and a triangular space said to be filled in with loose stone, which, it was claimed by the counsel for the respondent, made it impracticable for a team, with a heavy load, to approach the railroad crossing at such an angle as would enable the driver to make an easy and safe descent to the north.

Evidence was given to the effect that in the spring of the year 1886, eighteen months before the injuries were received by the plaintiff's intestate, the commissioner of highways had endeavored to remedy certain inequalities in parts of the highway already mentioned, by placing gravel in the places that had been dishd out by use. It was claimed by the counsel for the respondent, also, that these deposits of gravel, not being evenly distributed, contributed somewhat to the danger of the situation which confronted the deceased on this occasion.

An attentive perusal of the testimony seems to indicate that the highway commissioner could not have been properly held chargeable with negligence in respect to the triangular spaces, and in respect to the deposits of gravel which he had placed along this highway in the year 1886. The testimony is quite uniform, that these triangular spaces had existed in that condition substantially unchanged from the time that the railway took the highway over its tracks at grade. The evidence in regard to impairing the safety of the highway by reason of the deposits of gravel in the year 1886, is by no means satisfactory, and it is hardly possible that the jury could have intelligently based their verdict upon either of these supposed neglects of duty on the part of the highway commissioner.

It is substantially conceded, because not disputed in the evidence, that the highway was, at the time of the injuries complained of, substantially in the same condition as it had been for twenty-seven years and a half. The location is dangerous, whether the traveler approaches from the north or from the south. It is extremely hazardous for heavily loaded wagons on account of the precipitous grade from the railway tracks. The curves in which the traveler is required to drive materially increase the hazards of the traveler.

Evidence was adduced in behalf of the respondent that the deceased crossed the railway tracks and entered upon the descent of the highway upon the north, while sitting about midway of his load on the right hand side of it. Evidence was given that brakes were required to be used in managing loads of such weight. There is something more than a mere suggestion of testimony, that the wagon that carried the deceased was not at the time furnished with a brake, but there is testimony to the contrary, and to the effect, that though the brake had at one time been broken, it had been repaired before the journey in question was made. The testimony also shows that a brake could be manipulated by means of a rope by the driver while sitting in the place where some of the witnesses said the deceased was; one or more witnesses testified that as the driver descended the grade he was not sitting on the right hand side of the load, but was standing up in a position where, of course, he could not work the brake.

Under this condition of the evidence, it became a question of fact for the jury to say whether or not the deceased exercised proper care in descending the highway northward from the railway tracks. Though the testimony on this subject shows the case to be a close one, yet it presented manifestly a question which should have been, as it was in fact, fully submitted to the jury.

Eliminating the suggestion contained in the evidence, that

the town is liable on account of the failure of the commissioner of highways to have the triangle, so-called, so graded and leveled as to be passable by wagons, and the fact, as some of the witnesses testified, that loose hummocks of gravel had been allowed to remain upon the highway since the repairs of 1886, the charge of negligence against the commissioner of highways is substantially, that he failed to erect barriers along or near the traveled part of the highway so as to prevent accidents of this kind.

The learned judge, at the trial, in substance, charged the jury that the commissioner of highways was guilty of negligence if the highway was, at the time of the accident, unsafe for public travel; and also that it was no defense to the town to show that the highway had remained substantially in its present condition from the year 1860 to the time of the accident. This part of the charge was excepted to by the defendant's counsel. The judge said, "and neither is it a proper subject for you to consider, for the purpose of reaching a conclusion upon this branch of the case (as to whether Commissioner Lane was negligent or not) that this crossing has existed in this shape for thirty years. * * * If it has been for thirty years a bad highway, and by reason thereof this man was injured, the fact that it has existed a bad highway for that series of years is no answer to the plaintiff's claim in this case."

At the close of the charge, the counsel for the defendant asked the court to charge, that the fact that the road had been constructed and maintained in this same condition for nearly thirty years, is a circumstance in and of itself from which the jury may infer that it was properly constructed.

The court declined to change the charge upon that subject, to which counsel for the defendant excepted.

The charge, as it was delivered, and the request to charge, which was refused, present an interesting question. Had the defect in the highway, where the accident happened, been a break, or a hole, or a spot so manifestly dangerous

Opinion of the Court, by MACOMBER, J.

beyond the usual, natural or artificial dangers of the general situation of the highway, the charge, and the refusal to charge, as requested, would undoubtedly be correct. But the case in this aspect is unique. It is not a mere defective spot which seems to be the subject of complaint, and for which a verdict has been given against the town; it is rather for the generally dangerous crossing, which had been permitted to exist for twenty-seven and a half years. The ascent and the declivity were about eighty feet each in the line pursued by the deceased. The traveled part of the highway was nearly eighteen feet wide. Wagons had been accustomed to go within a distance of six inches to eighteen inches of the bank down which this load of bark was plunged. The spot where the wagon was overturned is not more dangerous to the public than any other spot of equal distance from the railroad track on either side of it. This whole region was dangerous, but not more dangerous at the time of the accident than it had been for the period above mentioned. The jury should have been allowed to have taken this circumstance into consideration in arriving at their verdict. The fact that the roadway had remained so constructed by the railroad company, unchanged for this number of years, was not a defense necessarily, but was a circumstance which the jury should have been allowed to take into consideration in determining the complicated question, whether Mr. Lane, the highway commissioner, was at the time personally chargeable with negligence for which the town must respond. Had the highway commissioner found a defective spot in this highway presenting something beyond the ordinary dangers of the whole established route across the railroad tracks, and had permitted it to remain to the injury of the traveler, a different question would, in my judgment, be presented. He found, when elected, the results of an enterprise which had existed through many administrations, substantially unchanged. Had the embankments been naturally and not artificially formed, and the highway had existed

thereon for this length of time, it would seem to be holding the rule up higher than it has ever been raised yet, to declare that the highway commissioner should be charged with a negligent omission to guard what, through public assent, had been safely left unguarded for nearly a generation. This is an error which should lead to a new trial.

The learned judge also charged that it made no difference in respect to the liability of a town whether the accident happened on the lands of the railroad company, as was the fact, or elsewhere, at a distance from the railroad lands. It is time that a municipal corporation which undertakes to maintain a highway across the lands of a railway company, though in no respect chargeable with the duty of the original construction, assumes a responsibility for an omission to furnish a safe highway. People *ex rel.* Markey v. City of Brooklyn, 65 N. Y. 349; Tierney v. City of Troy, 41 Hun, 120; 4 N. Y. State Rep. 15.

But when the difficult question of negligence or the omission of duty of a particular person enters into the case, the jury should be permitted to take into consideration every circumstance connected with the transaction which would tend to relieve him from responsibility.

It is further contended by the counsel for the appellant that the defendant should have been allowed to show that the commissioner of highways did not have funds with which to make the barricades to protect the public from peril. It is conceded by the counsel for the respondent that lack of funds and inability to raise them, is a defense to an action of this description. The proofs, however, do not come up to the point of establishing the fact that there were no funds in the hands of the highway commissioner with which to make the needful repairs. As the evidence stands in the record, the ruling of the judge was correct in this respect; for the evidence was adduced, not to the fact of possession of sufficient funds at the time of the accident, but rather to a period of a year and a half before that time. The rule,

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however, so conceded by the plaintiff's counsel, that want of funds and inability to raise them may be a defense, was established when the action for personal injuries through defective highways was brought only against the highway commissioner himself personally, and not as it is now permitted to be brought under chapter 700 of Laws of 1881, against the town itself. *Hover v. Barkhoof*, 44 N. Y. 113.

It is extremely doubtful whether the town, being the defendant and being made liable for the negligence of the highway commissioner, could show, or if it could that the court would permit it to show, a lack of funds, or inability to raise them, for making repairs. But we do not now pass upon this point.

The question of pleading this matter in the answer is also presented. The complaint alleged possession of adequate funds by the highway commissioner. The answer under the general denial put this in issue. The plaintiff gave no proof of this allegation, and the evidence which the defendant attempted to adduce upon the question was ruled out, not, apparently, on the ground of being inadmissible, but rather upon the ground of being insufficient, in the respect already pointed out. The plaintiff could properly have put the defendant to an affirmative defense of the want of funds, had he seen fit to do so, by remaining silent upon the subject in the complaint; but, having alleged the actual possession of funds by the commissioner, it would seem that it was not necessary for the defendant, in addition to a general denial, to plead affirmatively that fact in order to enable him to give evidence thereon.

The judgment should be reversed and a new trial ordered, with costs to the appellant, to abide the event.

DWIGHT, J., concurs.

Statement of the Case.

AMOS POTTER, Respondent, v. ABRAM F. GATES, Appellant.

Supreme Court, Third Department, General Term, February 24, 1890.

1. *Pleadings. Payment.*—A mere denial of the complaint does not permit proof of payment.
2. *Same. Failure to plead counterclaim.*—An omission to set up, in a former action, a counterclaim arising on an independent cause of action, does not preclude, nor is such former action a bar to, a subsequent suit thereon.
3. *Judgment. Offer of.*—An offer and acceptance of judgment before answer, have respect solely to the claims set up in the complaint. See note at end of case.
4. *Appeal.*—The appellate court should not attempt to review findings of fact.

Appeal from a judgment entered upon the report of a referee.

The complaint contained two claims.

The first was for goods sold and delivered. The second, on a special contract by which defendant was to draw logs to plaintiff's mill, enough to make 100,000 feet of lumber, and to pay plaintiff \$2 for sawing each 1,000 feet. And plaintiff alleged that defendant drew only enough to make about 40,000 feet, and had not paid for the sawing of these. The referee found, specifically, several matters of dealing between the parties. He found, substantially, that plaintiff had sawed for defendant 40,727 feet, and "stuck up" thereof 21,797 feet, for which defendant owed him \$112.61. He also found the plaintiff had done sawing for defendant, amounting to \$73.12, on which had been paid \$10. He also found a sale of lumber to plaintiff amounting to \$50.10, which plaintiff was entitled to offset against the preceding claims. He reported in plaintiff's favor \$125.63. Defendant appeals.

Opinion of the Court, by LEARNED, P. J.

W. H. Andrews, for appellant.

Conger & Orwis (*C. S. Conger*, of counsel), for respondent.

LEARNED, P. J.—The first point made by defendant is that the referee erred in excluding a question tending to show payment. The ground of the objection was that the answer did not contain any allegation of payment. There is no doubt as to the rule that payment must be pleaded, and evidence of payment cannot be given under a general denial. The case of *Quin v. Lloyd*, 41 N. Y. 349, is an exception, because the complaint was so drawn as to allege, not any definite amount for which defendant had become liable to plaintiff, but merely that a certain balance remained due after payments; and the court held that this opened the matter to proof of payments. That is not the present case. Each count avers facts showing that defendant had become indebted thereby in a certain amount to the plaintiff. The first avers an indebtedness of \$300, and a payment of \$10. The second avers damages by reason of the facts to \$200. A mere denial of this complaint does not permit proof of payment.

The next point is that a certain judgment previously recovered by Gates against Potter should have been held to be a bar to this action. Gates sued Potter in February, 1887, in justice's court. The amount of the respective accounts was found to exceed \$400, and the action was dismissed. Then in February, 1887, Gates sued Potter in the supreme court, on two causes of action,—one on contract, for wood sold; the other, principally for money paid, demanding \$306.48. Potter made an offer to permit judgment for \$125, which Gates accepted, and judgment was entered accordingly. The defendant's claim now is that the difference between his claim in that action, and the amount offered and accepted therein, really represented the plaintiff's present claim, and therefore that plaintiff is barred. But the plaintiff

was not bound to set up any counterclaim in that action which arose on an independent cause of action. His neglect to do so does not deprive him of his right of action thereon. *Brown v. Gallaudet*, 80 N. Y. 413. Therefore, that former action was not a bar. Nor can we assume that the offer and acceptance implied that the plaintiff's present claim was taken into account. The offer respected simply the complaint, and the cause of action therein set forth. No answer had been put in. If there had been an answer, probably, the offer and acceptance would have been a settlement of all matters contained both in the complaint and in the answer. Nor did the pleadings in the justice's court determine the question. Potter chose to offer a certain sum in payment of the claim of Gates, and Gates accepted it. The acceptance settled that claim; nothing more. It is true that a neglect to set up a defense to a cause of action concludes the defendant. But that is not true of a counterclaim arising on a distinct cause of action. To set that up is a privilege, not a duty.

The defendant urges that the referee erred in his findings of fact. Our right to review such errors is one to be rarely exercised. To a great extent, the referee is like a jury. It is not best that an appellate court should attempt to review findings of fact. As we have repeatedly said, the tribunal which sees and hears the witnesses generally reaches better conclusions than one in the power of an appellate court. There is conflicting evidence in this case. Both parties were witnesses. They had had a good deal of business with each other, not very large in amount, and perhaps not very carefully conducted. The defendant, for instance, claims that plaintiff made a contract with one Davis, who was to build a barn for defendant, and that defendant's only agreement was to pay if Davis did not. But that was disputed by the plaintiff and his witnesses, who claim that the contract was such that the defendant was the original debtor; and the referee found for the plaintiff. So there is a dispute of fact

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as to the amount of lumber actually sawed under this agreement, and evidence is given as to the amount used in the barn. But the referee finds that Davis sold to defendant the residue of the logs and lumber therefrom. Altogether, we think this is a case in which the referee's findings of fact should not be disturbed.

We see no errors in the exclusion of evidence.

Judgment affirmed, with costs.

NOTE ON "DEFENDANT'S OFFER TO COMPROMISE" IN ORIGINAL ACTIONS IN COURTS OF RECORD.

The form and effect of an offer of judgment, prior to the enactment of the Code of Civil Procedure, were regulated by section 385 of the former Code, which differed but little from the provisions of sections 738 to 740 of the present Code, and will aid materially in their construction.

Sections 738, 740, of the present Code read as follows :

§ 738. The defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

§ 740. Unless an offer or an acceptance, made as prescribed in either of the last four sections, is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect, that he is duly authorized to make it, in behalf of the party.

How made.—Two methods of obtaining judgments by the consent of defendants were provided by the old practice upon warrant of attorney, and upon *cognovit actionem*.

The entry of judgments upon *cognovit* is an ancient practice, and the Code has substituted a judgment upon offer to compromise for it. *Beards v. Wheeler*, 11 Hun, 539.

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There is much force in the argument that judgment upon offers to compromise was intended to afford a method whereby defendants, finding themselves without an available defense to the whole or some part of the claim, sought to be recovered by actions commenced without their concurrence, and with the intent on the part of the plaintiffs to reach a judgment by the usual processes incident to an action, might offer to compromise, and thereby save further costs. By using an offer to compromise, a judgment may be recovered upon the most general complaints, for money loaned, or goods sold, and without the support of an affidavit by any person. The inspection of such a judgment roll affords little information to an inquirer as to the good faith of the transaction. *Id.*

The offer of judgment must be in writing. It must be signed by, or in behalf of, the defendants to be bound by it and against whom judgment is to be taken, and can only be signed in one of three ways. (1.) By the defendants in person, each signing his own proper name. (2.) By an agent especially authorized to sign the same for them and in their name. Or (3.) By an attorney of the supreme court, whose authority to represent the parties will be presumed. *Stark v. Stark*, 2 How. N. S. 360.

By copy.—In *Marks v. Epstein*, 13 N. Y. C. P. 293, an action was brought to recover the sum of \$500. The defendant appeared, and at the time of serving his answer, served upon the plaintiff's attorney a paper purporting to be a copy of an offer to allow judgment in favor of the plaintiff for \$100 and costs, subscribed by the defendant and indorsed with the name and address of his attorney. The paper so served was returned by the plaintiff's attorney to the defendant's attorney. The action was tried and resulted in a verdict in favor of the plaintiff for a sum less than the amount of said offer, and the defendant thereupon taxed his bill of costs against the plaintiff's objection.

The language of § 738 of the Code is taken from § 385 of the former Code, under which the service of a copy of the offer to allow judgment was deemed sufficient. § 740 of the Code provides that, unless the offer is subscribed by the party making it, his attorney must subscribe it and annex thereto an affidavit to the effect that he is duly authorized to make it; but no affidavit is required from the party subscribing an offer, nor is any formal acknowledgment of execution necessary.

Where the offer served purports to have been subscribed by the defendant, the court must assume, in the absence of evidence to the contrary, that it was subscribed by his authority, and no formal proof of genuineness is required by the Code in the first instance.

Where a copy of the offer is subscribed by the defendant and indorsed with the name of his attorney, it is sufficient in form, and follows all

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the statutory requirements. And if the defendant is required to serve the original, the plaintiff will waive the irregularities by not returning the copy served, with the objection particularly specified. *Marks v. Epstein, ante*; *Snape v. Gilbert*, 13 Hun, 494; *Chemung Bank v. Judson*, 10 How. 133; *Broadway Bank v. Danforth*, 7 Id. 264. Such defect in the service, if it is one, constitutes only a mere irregularity, and in this respect the case differs from that of *Riggs v. Waydell*, 78 N. Y. 586, where the offer itself, subscribed by the attorney, was regarded as a nullity, because not accompanied by an affidavit of authority. The affidavit of the attorney is by § 740 of the Code made an essential part of the offer, and its omission, in that case, left the offer without statutory support.

But in *Marks v. Epstein, ante*, the alleged defect consisted in serving the copy instead of the original. If such service is insufficient, the defect is purely technical, not substantial, and the plaintiff is bound to return the copy served, with the defect pointed out so that it may be remedied.

In *Noonan v. Smith*, 12 Abb. N. C. 337, a copy of the offer of judgment and of the attorney's affidavit of authority were delivered to, and left with, the plaintiff's attorney. At the same time, the plaintiff's attorney endorsed, upon the original offer and affidavit, his admission of "due service of a copy;" but he subsequently objected that a copy, and not the original, was served upon him, and that the offer was ineffectual on that account.

The question as to which party is entitled to costs depends upon the effect to be given to the service of the offer of judgment. If it was necessary to serve the original offer and affidavit, they were waived, and plaintiff cannot object that the service has not been properly made.

When made.—In *Herman v. Lyons*, 2 Abb. N. C. 90, it was held that an offer by defendant to allow a judgment to be taken against him, made within ten days before the cause is reached in its regular order on the calendar, can be treated as a nullity by the plaintiff, and he can proceed with his action and full costs will be allowed as though no offer had been made. The defendant cannot prevent the plaintiff from recovering the costs of trial, by serving an offer, within ten days before trial, to allow judgment for the full amount claimed, with costs. Such offer does not stay the plaintiff's proceedings, or impose any obligation upon him to act at once in reference to the offer. He owes no duty to the defendant under § 738 of the Code, and has in all such cases ten days to elect whether he will accept the offer or proceed to trial. And if the offer is served so late that the cause is reached and tried before the expiration of the ten days, the offer is

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unavailable to the defendant. *Herman v. Lyons*, *ante*; 10 Hun, 111; *Pomeroy v. Hulin*, 7 How, 161; *Walker v. Johnson*, 8 Id. 240.

If the rule was otherwise, the service of an offer made when the cause was on the day calendar would prevent the plaintiff from proceeding to judgment and might compel him to lose the term.

In *Perine v. Wiggins*, 18 N. Y. C. P. 172, an action was brought upon a draft made by the defendant Hall, and indorsed by the defendant Wiggins. Hall defaulted in pleading, but Wiggins interposed an answer, upon which issue the cause was noticed for trial and placed upon the calendar. A motion was then made and granted to advance the case on the short cause calendar. Eight days before the day the cause was set down for trial, the attorneys for the defendant Wiggins served a notice withdrawing the answer, and, on the taxation of costs, claimed that, by reason of the service of the notice, the plaintiff was not entitled to tax costs after service thereof. But it was held that the notice can not be regarded as a sufficient offer of judgment under § 738, for the reason that no affidavit was annexed, as required by § 740 of the Code, *Riggs v. Waydell*, 78 N. Y. 586; and that it was of no avail as such an offer, because not made more than ten days before the trial. *Herman v. Lyons*, 10 Hun, 111.

In what actions.—In *Bathgate v. Haskin*, 63 N. Y. 261, an action was brought for the foreclosure of a mortgage, and the complaint demanded judgment against the defendants, personally, for any deficiency which might arise upon the sale of the mortgaged premises. The defendants answered by way of a counterclaim upon an account, and with their answer served an offer to allow judgment to be taken and entered for the sum of \$2,404, with costs and for a foreclosure and sale, pursuant to § 385 of the former Code. The offer was not accepted. A judgment for \$4,565.69 was obtained which was reduced by the general term; and upon appeal to the court of appeals, it was held that the court below erred in disallowing \$5,45, with interest from 1862, being a part of defendants' counterclaim, and directed that the judgment be reversed and a new trial granted, unless the plaintiff stipulated to reduce the amount by allowing such counterclaim. Upon such reduction, the plaintiff recovered less than the offer. And it was held that the provision of § 385 of the Code, which gives the defendant costs where plaintiff does not accept an offer of judgment, and fails to obtain a more favorable judgment, applies to foreclosure suits where a personal judgment against the obligor for any deficiency is asked.

In *Stevens v. Verlane*, 2 Lans. 90, it was held that the provisions of this section were not applicable to equitable actions and to an action for the foreclosure of a mortgage. The decision in this case was put upon the ground that the offer could not be properly proved before the

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judge, and therefore it would be impossible to adjudge the right to costs in view of such offer, as well as because, by the terms of the section, it was intended to apply only to cases in which costs are given as of course to the party who moved in the action, as it provides that the offer shall be that the plaintiff may enter judgment with costs. § 385 is sufficiently broad to comprehend all cases both at law and in equity, and its object is to circumscribe and arrest litigation by preventing trials.

In a foreclosure action, where judgment is asked against the obligor for a deficiency, it is virtually an action on contract. *Hunt v. Chapman*, 51 N. Y. 555. In the case last cited, it was said that an action to foreclose a mortgage was in law and in fact an action for the recovery of the amount unpaid upon the bond. Such an action therefore is not purely an equitable action, but this point was not considered in reference to the personal judgment in *Stevens v. Verlane*, *ante*.

The statute is very general, and permits offers to be made in all actions arising on a contract, and the courts cannot engraft upon it an exception which the legislature has not seen fit to make. If for any reason an application to the court is necessary, after the defendant has given his consent to a judgment for all that the plaintiff has a right to demand, this fact will not take the case out of the statute, but the plaintiff can go to the court, ask and obtain upon the offer such final directions as shall be necessary to give effect to the offer and perfect a judgment thereon. This case differs from that of *Bettis v. Goodwill*, 32 How. 137, for there the offer was restricted and did not include the amounts which might thereafter become due and to which the plaintiff was entitled. But in *Bathgate v. Haskins*, *ante*, the offer was comprehensive and full enough to cover the whole amount.

Where the answer sufficiently states what the claim is so as to enable the plaintiff to determine whether he will accept the offer, it is not required that the defendant shall defer his offer until a bill of particulars is demanded and furnished, and thereby incur the hazard of paying additional costs in case the plaintiff makes no demand. If the plaintiff is sufficiently informed of the nature of the defendant's claim, so as to determine whether he will accept or reject it, he is bound to act or take the consequences of a refusal. In the case of *Tompkins v. Ives*, 3 Abb. N. S. 367, no answer had been served, and it was held that the offer would operate on the plaintiff's claim, but not on the independent causes of action existing in favor of the defendant; that it should be construed as an offer in the action at the time it was served, and in its then condition and without reference to the changed condition by the future proceedings. But this case is not in point, where a defense is interposed, and the plaintiff informed of its true character by the answer.

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More favorable judgment.—Where the sum recovered is less than the offer made, the defendant is entitled to have interest computed upon the amount of the offer from the time it was made to the date of the judgment. The rule that interest cannot be added to the sum offered in determining whether the judgment is more favorable, is only applicable to actions where the damage are unliquidated.

In *Smith v. Bowers*, 3 N. Y. C. P. 72, an action was brought to recover the sum of \$196.48, a balance due for iron sold and delivered, with interest. The defendants offered to allow judgment for \$56 with interest and costs, but did not specify the time from which interest was to run. The jury rendered a verdict for plaintiff for \$58.75.

The offer of judgment authorized by the Code must be for a specified sum. Where the offer is for \$56, with interest, the only sum specified is \$56, and no significance can be given to the words, "with interest," from the impossibility of fixing any date for computation. In *Pike v. Johnson*, 47 N. Y. 1, it was held that in such a case, interest, added by a jury or by the court to the damages found, cannot be estimated in determining whether a judgment is more or less favorable to the appellant than the offer of the respondent.

In *Lumbard v. S. B. & N. Y. R. R. Co.*, 62 N. Y. 290, an action was brought to enforce a mechanic's lien against the property of the defendant in which the sum of \$527.63 was claimed. The defendant served an offer, under the Code, that the plaintiff might take judgment against it for \$226.50, with costs. A recovery was had for the full amount, and the judgment entered thereon was affirmed at general term; but, upon appeal to the court of appeals, it was reduced to \$302.16, and, as modified, affirmed without costs. And it was held that the offer of judgment for \$226.50 was restricted to the lien, and that a judgment more favorable to defendant was obtained. The plaintiff claimed a lien for the whole amount, and when the defendant offered judgment for a specified sum, it was necessarily and legally an offer that the lien might be enforced for that sum. The claim and offer must be construed with reference to each other. It is not material that a personal judgment might have been rendered against other parties; it would not affect the claim against, and offer by, this defendant. The judgment was reduced below the amount of the offer, and the effect is the same as though such judgment had been originally rendered by the supreme court.

The defendant is entitled to the benefit of his offer, which the statute gives him upon the reduction of the judgment in the court of appeals, the same as though the recovery had originally been for the reduced amount. The judgment of the latter court established the amount which should have been recovered in the first instance; and, in such a case, when the judgment of this court is made the judgment

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of the court below, it is competent for the latter court to treat it as its own judgment, and to give the defendant the statutory benefit of the offer. The modification which reduced the judgment to an amount entitling the defendant to costs cannot over-ride the statute, and must, therefore, by implication, be subject to the enforcement of the statutory right. *Id.* The right to costs in case of a reduced recovery is fixed by statute, and courts have no discretion over the subject. *Id.*

In *Leslie v. Walrath*, 45 Hun, 18; 26 W. Dig. 451, an action was brought on a promissory note. The plaintiff claimed to recover the sum of \$275 with interest and costs. The defendants set up a counterclaim, and before trial served an offer of judgment for the sum of \$150, with costs to date. The offer was not accepted, trial was had, and the plaintiff obtained a verdict for the sum of \$112.50.

The offer was ineffectual by reason of the limitation imposed by it in respect to costs, as its effect, if accepted, was to subject the plaintiff to the costs of entering judgment upon the offer, and of execution and entering satisfaction. The statute authorizing the offer provides that it shall allow a judgment, for a sum, or property, or to the effect therein specified, with costs. The party making the offer frames it to suit himself. In case he does not comply with the statute, in all substantial respects, it is a nullity, and may be treated as such by the party served with it. *Id.*; *McFarren v. St. John*, 14 Hun, 387; *Riggs v. Waydell*, 78 N. Y. 586. Where the party served with a valid offer accepts it, he is entitled to enter judgment upon it, and to tax the costs of the entry against the party making the offer. But where the offer, as in this case, is so framed that the plaintiff, if he accepts it, can tax no costs accruing subsequently to the date of the offer, he is limited, by the terms of the offer, within the statutory amount.

Where the word costs is used in the offer of judgment, it does not include disbursements. *Leslie v. Walrath*, 45 Hun, 18; 26 W. Dig. 451. It is to be regarded as used in the same sense in the offer as in the section of the Code which authorizes an offer. *Id.* In *Tompkins v. Ives*, 36 N. Y. 75, an action was brought for work, labor and services, and board and lodging furnished to the defendant and his servants. Four days before the answer was interposed, the following offer was served: "The defendant herein offers to allow the plaintiff to take judgment against him in this action for \$70, besides costs and disbursements. Watertown, Jan. 31, 1865." This offer was not accepted. On the third of February following, the defendant served his answer, setting up, among other things, counterclaims for goods sold and services rendered.

The import and effect of this offer must be determined by the condition of the pleadings at the time it was made. A notice of acceptance, whether served on the first or the tenth day, can apply only to

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the original offer. It operates upon the plaintiff's claim, but not upon independent causes of action existing in favor of the defendant, not set up at the time the offer was made. But in determining the right to costs, the plaintiff is entitled to the benefit of the counterclaims which the defendant afterward elected to interpose, and which were extinguished by the judgment. *Tompkins v. Ives*, *ante*; *Fieldings v. Mill*, 2 Bosw. 489; *Ruggles v. Fogg*, 7 How. 324; *Budd v. Jackson*, 26 Id. 401; *Schneider v. Jacobie* 1 Duer, 694.

In *Wallace v. American Linen Thread Co.*, 16 Hun, 404, an action was brought to enjoin the defendants from infringing the plaintiffs' trade-mark, and to recover damages for the infringement already made. Before the trial, the defendant served an offer of judgment to the effect that judgment should issue according to the prayer of the complaint, and that plaintiff recover damages against the defendants to the amount of \$50, together with the costs of the action. The offer was not accepted.

§ 738 of the Code provides that, where such offer is served and not accepted, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time. Though the verdict of the jury may be less favorable, it is the judgment of the court to which the Code looked, and which must be controlling as to the right to recover costs.

Amendment.—In *Woelfle v. Schmenger*, 12 N. Y. C. P. 312, an action was commenced and the complaint therein set forth three causes of action for work, labor and services performed. The defendant answered setting up a general denial and a separate defense or a counterclaim; and on the same day he served an offer to allow a judgment to be taken against him for \$130, interest and costs. Thereafter plaintiff served an amended complaint from which were omitted two of the causes of action, and the defendant subsequently answered setting up a general denial. The plaintiff obtained a verdict for \$77, and the clerk taxed costs in his favor.

The defendant thereupon made a motion, and the court granted an order for a new taxation of costs. On appeal it was held that, where, after the making of an offer of judgment, the plaintiff amends his complaint by omitting some of the causes of action and reducing the recovery sought, the offer ceases to be binding or conclusive upon either party, and becomes for all purposes nugatory. But it seems that, where an amendment to a complaint is one of form only, an offer of judgment, theretofore made in the action, would be binding upon the parties, notwithstanding such amendment. The power to amend a pleading and the right to make an offer of judgment are both derived from the Code, and the power is to be so construed that the legitimate exercise of one may not conflict with that of the other.

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After the time had expired in which the plaintiff can accept the offer of judgment, he cannot, by any amendment of the complaint, take from the defendant the right ultimately secured to him by the offer. If a plaintiff amends his complaint in order to fortify his case against the legal effect of an offer of judgment, by enlarging the area, or the amount, of his demands, so that even a new answer of new or additional matter may be required, yet, if he in the end fails to recover a more favorable judgment than that offered by the defendant, there is no good reason why he should not be subjected to the payment of the defendant's costs, as required by § 738 of the Code. See *Kilts v. Seever*, 10 How. 270. Any amendment which the plaintiff may see fit to make, cannot deprive the defendant of the benefit of his offer. *Id.*

Under the former practice, the plaintiff might refuse the defendant's offer with impunity; he could proceed in the action notwithstanding such offer, and swell up a large bill of costs for the defendant to pay. The Code has furnished a remedy for this evil; the provision is just, and should be carried into full effect by the courts.

A *cognovit actionem* could be given before declaration, under the former practice; the Code authorizes a defendant to offer a confession of judgment to the plaintiff at any stage of the action before verdict. If an offer of judgment may be made before the complaint is served, an amendment of the complaint cannot deprive the defendant of the benefit of an offer made after complaint served, and prior to such amendment. *Id.* An offer, when served with the answer, must be held to have reference to the claims and demands which each party has set up in his pleading against the other, the same as a *relicta cognovit* formerly had. The case of *Schneider v. Jacobi*, 1 Duer, 694, bears directly upon this point.

It was held in *Hirschsprung v. Boe*, 20 Abb. N. C. 402; 13 N. Y. C. P. 125, that, where a defendant in an action makes an offer to allow judgment to be taken against him, which is not accepted, and the plaintiff thereafter recovers a judgment which is not more favorable than the offer, the latter is entitled to costs up to the time of the offer and the former to costs thereafter.

The right of parties to costs, where an offer is made, is determined as at the time of trial. For instance, if a plaintiff sues for \$49, he is not entitled to costs; but, if a defense is interposed, and the claim, with interest added to the time of trial, aggregates \$50, and the plaintiff has a recovery for that amount, he is entitled to a full bill of costs. *Id.*

Extra Allowance.—In this case it was further held that, where the defendant in an action becomes entitled to costs by reason of having

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made an offer of judgment which was not accepted, the court may grant him an extra allowance, and the exercise of its discretion by the court cannot be reviewed by the clerk on taxing costs. In the case of *Magnin v. Dinsmore*, 46 How. 197; 15 Abb. N. S. 331, it was held that where, after issue joined, the defendant serves an offer to allow judgment, and plaintiff failed to obtain a more favorable recovery, the defendant is not entitled to an allowance. If this decision denies the power of the court to grant an allowance where an offer has been made and rejected, it is not to be approved. There is nothing in § 3253 of the Code that imposes any such limitation of power, nor is there anything in *Penfield v. James*, 56 N. Y. 650, that necessarily implies such a limitation. Where the offer is not made until the issue is approaching trial, this circumstance may have its influence on the question whether an allowance ought to be granted to the defendant, inasmuch as his right to costs commences to run only from the time the offer is made.

In *Riggs v. Waydell*, *ante*, a motion was made by the defendants for an extra allowance and for leave to serve upon plaintiff's attorney the affidavit prescribed by § 740 of the Code of Civil Procedure, with the like effect as though it had been annexed to an offer of judgment herein, which had been subscribed and served by defendants' attorney without annexing such affidavit. And it was held that the offer made by the defendant to allow judgment to be taken was imperfect, because it was not in conformity with the Code, and, if the case was one in which the courts were authorized to allow the defendant to serve the affidavit required *nunc pro tunc*, it was a matter of discretion with the special term, and having once been refused there, and also by the general term, no appeal lies to the court of appeals.

In *Eagan v. Moore*, 2 N. Y. C. P. 300, the defendant served on the plaintiff's attorney an offer of judgment pursuant to § 738 of the Code. This offer was signed by the defendant's attorney, but it did not have annexed his affidavit to the effect that he was duly authorized to make it. This offer was not accepted. Judgment was rendered in favor of the plaintiff, for a sum less than the amount of the offer. The defendant thereafter moved to amend his offer of judgment so as to supply the omission. And it was held that the court has the power to allow the amendment of an offer of judgment, after the trial of an action, *nunc pro tunc*, as of the time it was made; and that, where both parties to the action supposed that the offer of judgment, in such case, was in proper form, and there is no pretension that the plaintiff was misled by its informality, or that he would have accepted it, if it had been in proper form, it was a proper case for the allowance of such an amendment.

When set aside.—It has been claimed that § 385 of the former Code

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applied only to cases in which the defendant was willing to admit a part of the plaintiff's demand, and that, when the defendant wished to confess a judgment for the whole amount claimed by his creditor, he must comply with the requirements of §§ 382, 383 of that Code, and in case he did not, the judgment might be set aside on the application of subsequent judgment creditors. But it was repeatedly held that the proceedings under the various sections of the former Code were entirely distinct and independent of each other, and that the confession of judgment without action under §§ 382, 383 was analogous to confession by bond and warrant of attorney under the former system of practice, and that the proceeding under § 385 was analogous to the former mode of judgment upon cognovit. *Ross v. Bridge*, 24 How. 163.

There was nothing in the language of § 385 which showed that it was the intention of the legislature to limit the right of a defendant to offer judgment in an action regularly commenced against him, to cases in which he would be willing to confess a part of the plaintiff's claim, *Id.* Under the former system of practice, a party who had commenced an action was not compelled to receive a cognovit, but could proceed and take judgment by default. But the Code has made it compulsory upon the plaintiff to accept the offer of the defendant, under the penalty of paying costs, if he proceeds in the action and fails to obtain judgment for a more favorable sum than that for which judgment is offered. *Id.*

In this case the plaintiff in an action moved to set aside a prior judgment, on the ground that it was entered upon an offer served by the defendant, pursuant to § 385 former Code, after the service of a summons and complaint upon him, and that the offer was for the full sum demanded in such summons and complaint. And it was held that an offer of judgment for the full sum demanded is allowable and the provision is not limited to cases in which the defendant is willing to permit the plaintiff to take judgment for only a part of his claim.

In *Ross v. Bridge*, *ante*, it is said: "There can be no doubt that the court has a right to set aside a judgment entered upon an offer of judgment, and would exercise it in a case in which it should be made to appear that such a proceeding was taken collusively between the plaintiff and defendant for the purpose of evading the provisions of §§ 382, 383."

It is very evident that the justice, who wrote the opinion in this case, did not mean quite what his language may be construed to imply. "Collusively," as used in the paragraph quoted, must refer to some deceitful act suffered or done other than the recovery of the judgment by offer to compromise. Giving priority to one just debt over another, has always been permitted by the law of this state, and though the method by judgment on an offer to compromise may not be the most

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satisfactory to effect such a preference, still it has been sanctioned by the practice of many years, and a judgment recovered in that way cannot, on account of the method employed, be declared fraudulent.

In *Trier v. Hermann*, 44 Hun, 489, an action was brought to vacate or annul a prior judgment recovered in favor of a third party against the defendants in this action. Said judgment was entered upon an offer served with the complaint in that action and accepted by the plaintiff therein. The judgment was assailed as invalid, under a claim that the object of entering it on the offer and acceptance was to evade the observance of the statutory requirements made for the entry of judgment by confession. There was no impeachment of the indebtedness upon which the judgment had been recovered, nor was it alleged that said judgment had been collusively or fraudulently entered.

This was held not to be sufficient to entitle the plaintiff, as a subsequent judgment creditor, to maintain an action to set aside the prior judgment; for even though the plaintiff in the prior judgment brought his action upon the indebtedness to recover his judgment by suit, and not by confession, to avoid or evade the provisions of the statute regulating the proceedings through which a judgment might be confessed, this of itself would not render a judgment so obtained either fraudulent or collusive; and no authority can be referred to which will support any other view.

But it is plainly intimated in the authorities that the judgment must be collusive or fraudulent before it can be set aside where it has been recovered in this manner. The conclusion of the court in *Ross v. Bridge*, *ante*, and *Beards v. Wheeler*, *ante*, is to this effect. The case of *Moses v. McDivitt*, 88 N. Y. 62, does not in any manner consider this point. In this case the only question was whether the judgment, which had been recovered in this manner, in order to authorize and protect a usurious transaction, should afterwards exclude the defense of usury, and this the court held that it could not do. No authority exists which empowers the court to vacate a prior judgment on the service of a summons and complaint, and an offer of judgment and acceptance of the offer, for the sole reason that the proceedings are taken in this manner, as being preferable to those provided for the recovery of judgments by confession. Where the complaint states all that is required to set forth, and presents a legal cause of action, and so long as the defendant is willing to permit judgment to be entered against him as it is demanded in the complaint, and the indebtedness has in no manner been impeached, the court is not authorized in an action brought for that purpose, to vacate or set aside the judgment.

This case went up on appeal from the judgment of the general term to the court of appeals, and is reported in 115 N. Y. 163. It was there held that a creditor may obtain a judgment in one of three ways:

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(1.) He may serve a summons in an action and take judgment after a trial or by default, but he must pursue the regular practice to that end. (2.) He may serve a summons and complaint and obtain an offer of judgment from the defendant, and upon that enter judgment under § 738 of the Code; and if he adopts this course, he must pursue the practice prescribed. Or (3), he may obtain a judgment by confession in the manner provided in §§ 1273, etc., of the Code. He may pursue one for the express purpose of avoiding the other methods, because the statute gives him the absolute choice. If his practice is regular and his claim and proceedings are honest and *bona fide*, the court will not deprive him of the advantage his judgment will give him.

In *McFarren v. St. John*, *ante*, the question arose between the parties to the action in respect to an offer of judgment without the affidavit annexed, to which the plaintiff's attorney gave no attention, and the court held that he was at liberty to disregard it and to recover costs subsequent to its service, although his recovery was less favorable than the offer; and the remark there made that the offer without the affidavit was a nullity, treated as referring to the right of the plaintiff's attorney to so regard it, was correct in its application to the situation. The same may be said of the case of *Riggs v. Waddell*, 17 Hun, 515. These cases went no further and embraced within their application the parties to the action only, and their doctrine does not deny to the parties the right to waive the defect, nor does it determine the effect of waiver upon a judgment entered in such a case.

The statute provides that "unless an offer or an acceptance is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect that he is duly authorized to make it, in behalf of the party." § 740, Code Civ. Pro. This provision was intended for the benefit and protection of the parties to the actions in making and accepting offers of judgment provided for by § 738. *Citizen's Nat. Bank v. Shaw*, 46 Hun, 589.

Where the affidavit of the managing clerk of the defendant's attorney annexed to the offer, does not satisfy the statutory requirement, the plaintiff's attorney is at liberty to treat the offer as a nullity and disregard it for the want of the requisite evidence of authority of attorneys for the defendant to make it. *Id*; *McFarren v. St. John*, *ante*; *Riggs v. Waddell*, *ante*. If he does not so treat it, but formally accepts the offer, and annexes to his notice of acceptance the requisite affidavit, and thereupon enters judgment, the omission to annex the proper affidavit to the offer of judgment is waived by such acceptance and entry of judgment. *Id*.

The method of offering and by acceptance hastening the right to take and cause the entry of judgments, is a proceeding in a pending action, and differs somewhat from a statutory method and proceeding provided

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for the purpose of taking judgment without action, as upon bonds and warrant of attorney and the more recent means known as judgment by confession.

The provision, directing annexation of an affidavit to the offer of judgment in case it is made by the defendant's attorney, is designed for the benefit of the parties and as a safeguard against the exercise by their attorneys, of the power to determine their client's rights in the action without the latter's authority. While as between them, the failure to observe the requirement is available, it is an irregularity in the action which the parties may waive, and does not legitimately concern third parties, and, having been once waived, is not the subject of their criticism going to the validity of the judgment. And the record is properly amendable in that respect on application of the parties to the action. *White v. Bogart*, 73 N. Y. 256; *Maples v. Mackey*, 89 Id. 146; *Clapp v. Graves*, 26 Id. 418; *Close v. Gillespie*, 3 John. 526.

The judgment in an action is entered upon an offer and acceptance, with no statement of the claim further than it is represented by the allegations of the complaint. The affidavit to the offer of judgment has relation only to the authority, when the offer is subscribed by him, of the attorney from his client to do so. If no authority is given, the client very likely may get relief from the judgment if the affidavit is wanting, because, in that event, its absence will charge the plaintiff with notice of such want of authority. And though the requisite power was received by the attorney of the defendant, and his affidavit was waived by the plaintiff, the court, by its clerk, might, by reason of its omission, refuse to enter the judgment; but this fact does not characterize the defect as anything more than a mere irregularity in the proceeding, and the validity of the judgment, if entered under these circumstances, would not be substantially affected or impaired by such omission in the record.

In *Bulger v. Rosa*, 47 Hun, 435, an action was brought in replevin to recover the possession of a stock of groceries from the defendant. The defendant by his answer justified under several executions issued on judgments rendered against the plaintiff and his co-partner, averring that the property in question belonged to them, or that they had a leviable interest therein. The papers in each of the judgment-rolls contained a summons, verified complaint, general appearance for both defendants by an attorney-at-law, offer of judgment against both defendants, subscribed by the said attorney, accompanied by an affidavit that he is the attorney for the defendants in the above entitled action, and is duly authorized by one of said defendants, who are co-partners, to make the foregoing offer of judgment on behalf of said defendants, and has subscribed the same pursuant to such authority; and acceptance of the offer by the plaintiff's attorney duly verified, affidavit of

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the plaintiff's attorney of the offer and acceptance, statement of judgment, etc.

§ 740 of the Code provides that, when an offer of judgment is subscribed by an attorney, instead of the party, he must annex thereto his affidavit, to the effect that he is duly authorized to make it, in behalf of the party.

Where the attorney states in effect, in his affidavit, that he was duly authorized by one to make the offer in behalf of both defendants, and if the other partner did direct his co-partner to give the attorney such authorization, the latter was beyond doubt as duly authorized within the meaning of the foregoing section as though the partner had given him personal authorization. In such case, it cannot be claimed that the affidavit on its face shows a want of authority by one partner to offer judgment for the firm. If such authority was not actually given by one partner through his co-partner, the former had a complete remedy in a motion to set aside the judgment as against him, upon the ground of irregularity. *Bulger v. Rosa, ante*; *Garrison v. Garrison*, 67 How. 271.

But either a motion or an action, brought directly for the purpose, is necessary in order to relieve him from the burden of the judgment, even though no authority had been given by him to make the offer. The general appearance by an attorney-at-law for both defendants, though partners, will confer jurisdiction upon the court, of both the subject, matter of the action and of the persons of the defendants. Where jurisdiction has been thus acquired by the court before the offer of judgment is made, the offer, though defective, will not render the judgment wholly void. It merely constitutes an irregularity voidable on disclaimer and motion by the defendant who is erroneously affected. But where the irregularity is the result of a mistake, the court, in the interests of justice, can by order permit a proper affidavit to be supplied, and the judgment made regular in form. The judgment, since the defect is one of regularity of procedure, and not of jurisdiction, cannot be attacked collaterally.

In *McFarren v. St. John, ante*, it was held that an offer of judgment signed by the defendant's attorney is a nullity, unless verified as required by § 740 of the Code. The plaintiff is not entitled to enter judgment upon it, if he accepts it; and, unless it is sufficient for all the purposes of an offer, it is of no avail.

The plaintiff, by simply retaining an offer, does not waive the omission of the verification clause. An offer of judgment is not analogous to an answer or other pleading. An answer is a proceeding hostile in all respects to the party on whom it is served; and, if he chooses to waive an irregularity in it, he may do so; and he is deemed to have done so by receiving and retaining it without objection.

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While an offer of judgment, under the Code, is to some extent undoubtedly hostile to the party on whom it is served, as it imposes upon him the responsibility of accepting or rejecting it at the peril of losing his costs, and of becoming liable to pay the costs of his adversary, it is not wholly so. If he accepts it, he is decidedly benefited by it, for it renders further litigation unnecessary, and enables him to enter judgment for the amount offered without delay. So far is it from being an exclusively hostile proceeding, it may be used, by connivance between the parties to it, as a means of obtaining a fraudulent judgment at the expense of the creditors of the party making the offer. *Id.*

The provision of § 740 of the Code is new, and was obviously regarded by the legislature as material to the rights of both parties. So far as the party in whose behalf it is made is concerned, the opposite party can waive nothing for him. Unless the offer, when subscribed by the attorney, is verified according to the statute, it cannot have the effect to set the party on whom it is served in motion; he is not required to notice it in any manner; he need not return it, and he waives nothing by not returning it. The omission of the verification clause in such case is not a mere irregularity, but matter of substance.

In *Werbolowsky v. The Greenwich Ins. Co.*, 14 Abb. N. C. 96, it was held that an offer of judgment made by an attorney, without affidavit to his authority, is not merely irregular, but insufficient in substance, and a nullity not amendable. But in the case of *Eagan v. Moore*, *ante*, it was held that the court had the power, under § 724 of the Code, to allow an amendment, by supplying the affidavit of the attorney, that he was authorized to make the offer which was omitted by the attorney, after the judgment. In *McFarren v. St. John*, *ante*, and in *Riggs v. Waydell*, *ante*, the contrary was held, and it was ruled that it was not an irregularity but a matter of substance. The latter case was affirmed by the court of appeals, though the precise point was not necessarily passed upon in the appellate court.

An amendment which virtually creates a new proceeding is not within the intent or spirit of § 724 of the Code, authorizing the court to amend proceedings. The right to make an offer of judgment is purely statutory, and if the statute in that respect is not complied with, the opposing counsel has an undoubted right to rely upon its insufficiency, otherwise he might have accepted it, if he had supposed that the court could give it life after the rendition of judgment.

It seems that, where a debtor, against whom actions have been commenced by different creditors, serves an offer of compromise under § 738 of the Code in the action last commenced, and thus enables the plaintiff therein, by accepting the same, to perfect his judgment in ad-

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vance of the creditor who first brought suit, and to obtain a preference in the payment of his debt, it is not such a fraud as will authorize the setting aside of the judgment so obtained, as the giving of a preference by a debtor to one creditor is not unlawful. *Beards v. Wheeler*, 76 N. Y. 213. The debtor may have reached the same end by payment, by turning out properly, by chattel mortgage, by confession of judgment or by an assignment.

In *White v. Bogart*, *ante*, a contest was made over surplus moneys arising on foreclosure, and certain judgments against the mortgagors were claimed to be prior liens. Each of these judgments, as appeared by the judgment roll, was entered upon an indorsement on the summons or complaint, signed by the defendants, admitting due and personal service thereof, waiving the twenty days time for answering, and consenting to the entry of judgment forthwith for the amount claimed. And it was held that there was an appearance by the defendants in person in the several actions, which was equivalent to a personal service of a summons, and gave the court jurisdiction of the persons, without the service of a summons and complaint; also, that the consent that judgments be entered was the equivalent of an offer of judgment under § 385 of the former Code; and that, although there was no formal acceptance of the offers, they were accepted, in fact, by the entry of the judgments; and the want of a formal acceptance in writing, to be filed with and made a part of the record, was an irregularity merely, not affecting the validity of the judgments, and that the acceptance may be filed at any time, *nunc pro tunc*, by leave of the court, or may be waived by the party.

There is an obvious distinction between an action by an attaching creditor to set aside a prior confessed judgment, because intended to hinder, delay or defraud creditors, and a motion by such creditors, to set aside the judgment for want of conformity in the practice to a provision of the Code. *Stark v. Stark*, 2 How. N. S. 360. Defects and irregularities do not affect the jurisdiction of the court; and where no fraud or collusion is imputed to the parties, the remedy for such defects is given to the party alone. *Gere v. Grundlach*, 57 Barb. 15; *Bouf v. Meyer*, 2 How. N. S. 20; *Stark v. Stark*, *ante*.

In the latter case, a motion was made by an attaching creditor to set aside a judgment, which had been entered upon plaintiff's acceptance of an offer made by defendants, on the ground that the acceptance did not have annexed thereto any affidavit to the effect that the plaintiff's attorneys were duly authorized to accept said offer, as required by § 740 of the Code; and it was held that the court has power to allow an amendment *nunc pro tunc* annexing the proper affidavit; and that, where it appears that the omission to annex the proper affidavit to the acceptance was an inadvertence of the attorney, and

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that the authority to accept actually existed, the amendment should be granted.

Joint debtors.—The purpose and object of § 385 of the former Code and succeeding sections were clearly indicated by the title of the chapter, as well as by the report of the commissioners by whom it was reported to the legislature. *Bridenbecker v. Mason*, 16 How. 203. The former Code required that, in actions arising upon contract for the recovery of money only, the plaintiff should insert in the summons a notice that he would take judgment for a sum specified therein. If the defendant did not desire to contest this amount, he might suffer judgment to pass by default and without appearance. Where he conceded the cause of action to an amount less than that claimed, or was willing to concede something rather than litigate, he might, by way of compromise, make an offer of judgment, under this section, and this offer was not confined to actions upon contract. In most cases, this provision was resorted to in fraud of the chapter regulating the confession of judgment, and very seldom to accomplish the good intent of its framers. *Id.* The proceeding was, however, within the letter of the statute, and, in the face of the very general practice, sanctioned in part by the acquiescence of the courts. *Id.*

The former Code authorized the defendant to serve upon the plaintiffs an offer in writing, to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. This privilege was not confined to actions against a sole defendant, but extended to actions against several defendants. Whether all, who had been served with process, should not join in the offer, unless the plaintiff was entitled to judgment by default against those not uniting therein, was questionable. The offer had to be such and made at such a time, that the plaintiff might at once avail himself of it and take his judgment. Where only one of several defendants jointly liable upon the cause of action stated in the complaint, all of whom had been served with process, offered a confession of judgment under this section, while the other defendants could still come in and litigate, the plaintiff was greatly embarrassed. If he must still litigate with the other defendants, all inducements to accept the offer were gone; and to accept, in the case of unliquidated damages, an offer of judgment by one defendant for a specific sum, while the verdict against the other might be for a very different sum, was out of the question, as no joint judgment could, in that case, be given.

"The defendant," in § 385 of the former Code, was held to mean a sole defendant, or all the defendants who had been served with process and really made but one party to the action. *Bridenbecker v. Mason, ante.*

This was the effect of the decision in *LaFarge v. Chilson*, 3 Sandf.

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752. The court in the latter case very carefully limited the right of one or more of several defendants to serve an offer under this section, to the case where the suit was so situated in respect to the other defendants that the plaintiff might at once enter judgment to the effect offered against all the parties jointly liable with those making the offer; as where the co-defendants' time to answer had expired, and they had not appeared. *Id.*

In the other cases in which an offer from one of several defendants has been held proper, only the defendants making the offer had been served with process, so that, upon accepting the offer, the plaintiff was immediately entitled to judgment against all the defendants in form, but which should affect only the individual property of those joining in the offer. *Id.*; *Orwell v. McLaughlin*, 10 N. Y. Leg. Obs. 316; *Lippman v. Joslin*, 1 C. R. N. S. 161; *Emery v. Emery*, 9 How. 130. The judgments in these cases were sustained under the provision regulating proceedings against joint and several debtors. The rule was the same under the former practice. *Pardee v. Haynes*, 10 Wend. 630.

In *Garrison v. Garrison* (3 cases), 67 How. 271, the plaintiffs each commenced an action in the supreme court by the service of a summons and complaint upon one of the defendants only. This defendant on the same day retained an attorney, who served upon the plaintiff's attorney offers in writing duly verified by said attorney, by which he offered to let the plaintiffs take judgments against both defendants for the full amount claimed in each case. The offers were accepted and judgment entered accordingly. The defendant, who was not served, moved to set aside said judgments upon the grounds of irregularity and collusion.

Where there are two or more defendants and the action can be severed, the Code permits an offer to be made by one or more defendants against whom a separate judgment may be taken. Under this clause of § 738, a judgment may be taken against him who makes the offer, if a separate judgment can be taken. But there is no statutory authority allowing one joint debtor or partner to make an offer in behalf of his joint debtor or co-partner.

Section 1932 of the Code, which allows judgment to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers. Nor does § 1278 relate to offers, but only to confessions of judgment. The common law power of one co-partner to act as the agent of the firm is limited to the ordinary firm business. *Mabbett v. White*, 12 N. Y. 442. The judgments, in the three cases of *Garrison v. Garrison*, *ante*, were vacated with costs. See also *Tripp v. Sanders*, 59 How. 379; *Burney v. LeGal*, 19 Barb. 592; *Bredenbecker v. Mason*, 16 How. 203; *Everson v. Gehrman*, 10 Id. 301.

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In *Heckemann v. Young*, 55 Hun, 406, it was held that § 738 of the Code is expressly limited to two or more defendants, when the action can be severed, and does not contemplate joint debtors. Where there are two or more defendants, and the action can be severed, an offer may be made under this section. Where a plaintiff takes a judgment against one of two joint debtors, on his offer of compromise, the debt is merged in the judgment. He commits an error in entering the judgment against the defendant making the offer, until he has the right to do so against the other defendant; at such time he has the right to use the offer under § 738 in conjunction with a default, or a verdict, or the report of a referee, as to such defendant.

In *Bannerman v. Quackenbush*, 7 N. Y. C. P. 428, the defendants were sued as partners upon a firm indebtedness. One of the defendants appeared and served an offer to allow judgment to be taken against him for \$65.54, with interest and costs. The other defendant was not served with process, and did not appear. The plaintiff entered a judgment against the defendants jointly for \$72.91. The question presented is whether the circumstance that the judgment is a joint judgment against both defendants makes the recovery more favorable to the plaintiff than the offer of the defendant who appeared in the action.

If a joint judgment could have been entered on the offer, the judgment recovered is not more favorable. But if a joint judgment could not have been so entered, the recovery is more favorable because it is enforceable against the joint property of both defendants, as well as the separate property of the defendant served. See *Griffiths v. DeForest*, 16 Abb. 292.

The Code, in regard to offers to allow judgment, provides that the defendant may, before the trial, serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum or property, or to the effect therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. In *Bannerman v. Quackenbush*, *ante*, the action was not severed, nor was it capable of severing, so that a separate judgment could have been taken against the defendant who made the offer. See *Niles v. Battershall*, 2 Robt. 146; 18 Abb. 161; 27 How. 381; *Nelson v. Bostwick*, 5 Hill, 37.

In *Garrison v. Garrison*, it was decided that there is no statutory authority allowing one joint debtor or partner to make an offer of judgment in behalf of his joint debtor or co-partner, and that § 738 of the Code only applies to cases where a separate judgment must be taken against the party who makes the offer, and that § 1932 of the Code, allowing judgment to be entered in form against both joint debtors when one only is served, does not relate to judgments entered upon

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offers of judgment. This construction accords with *Everson v. Gehrman*, 1 Abb. 167; 10 How. 301, and *Binny v. LeGal*, 1 Abb. 283; 19 Barb. 592; 2 L. Bull. 63. Offers to allow judgment are to be construed most strongly against the parties making them, as they have it in their power to choose their own language and make them definite and in accordance with every requirement. *Bannerman v. Quackenbush*, *ante*; *Bettis v. Goodwill*, *ante*.

The first sentence of § 738 of the Code of Civil Procedure is identical with § 385 of the former Code. Under the former Code, it was held that one joint debtor, or one co-partner, might make an offer that the plaintiff should take judgment against the defendant jointly liable; and, if he was authorized to make such an offer by his co-defendants, or if there was a general appearance for all, or if the offer was made to secure a *bona fide* creditor, judgment might be entered upon the offer against all the defendants in form, and enforced against their joint property and against the individual property of the defendant served. *Bannerman v. Quackenbush*, 17 Abb. 103; 9 N. Y. C. P. 110; and see also *Olwell v. McLaughlin*, 10 N. Y. Leg. Obs. 316; *Bredenbecker v. Mason*, *ante*; *Binny v. LeGal*, *ante*; *Emery v. Emery*, 9 How. 131. It was also held, under the former Code, that where one of two defendants jointly indebted made an offer to plaintiff to take judgment against him, and his co-defendants were in default for want of an answer, or had not appeared, so that the plaintiff on receipt of the offer might at once enter judgment against both defendants, he must accept it or proceed at his peril as to future costs. *Bannerman v. Quackenbush*, *ante*; *Forge v. Chilson*, 3 Sandf. 752; *Bredenbecker v. Mason*, *ante*.

In *Bannerman v. Quackenbush*, *ante*, the co-defendant was not in default and had not been served with process, and the offer was not made on behalf of the joint debtors but was an offer of judgment, by the defendant served, against himself alone. It was expressly held, in *Everson v. Gehrman*, *ante*, that such an offer did not authorize a judgment against the defendant making the offer and his co-partner as joint debtors; and a judgment entered against both debtors upon such an offer was set aside as irregular. If the effect of an offer by one of two joint debtors is simply to authorize an individual, and not a joint, judgment, so that the plaintiff cannot have execution against the joint property, it is certainly an offer of a less favorable judgment than that which he recovers against both joint debtors in form. This was decided in the case of joint and several debtors, in *Griffiths v. DeForrest*, where two out of four defendants offered to allow judgments against themselves separately.

The Code of Civil Procedure contains a provision not found in the former Code, by which one or more defendants in an action which can be severed, may make the offer of a separate judgment. This provi-

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ion was inserted to cover such cases as *Griffiths v. DeForrest, ante*, where the action is brought against defendants jointly and severally liable as to whom the action may be severed, and against whom separate judgments may be taken; but it has no reference to actions against defendants whose liability is joint, as in the case of copartners sued upon a firm debt.

It has been held since the adoption of the Code of Civil Procedure, that there is no authority for one copartner to make an offer of judgment for the firm, *Garrison v. Garrison*, 67 How. 271, and that no offer by one copartner is effectual without evidence that the other copartners approved or ratified it. *Weed v. Bergstresser*, 2 L. Bull. 55; *Binney v. LeGal, ante*.

An offer to allow judgment under § 738 of the Code is but a substitute for the former cognovit by which a defendant who had no defense gave to the plaintiff a written confession of the action. *Kantrowitz v. Kulla*, 20 Abb. N. C. 321; 13 N. Y. C. P. 74. On the assumption that the offer provided for by this section is practically a written confession by the defendant making it, there is no reason why judgment may not be enforced against the party making it, without barring the action against the other joint debtor who did not make the offer. Prior to the enactment of § 1278 of the Code, a judgment against one joint debtor operated to merge the debt in the higher security of the judgment, which was regarded as the bar to any action against the other joint debtors, and this was the case whether the judgment was recovered by action or upon confession. *Candee v. Smith*, 93 N. Y. 349. This section was designed to change this technical rule of the common law, by permitting one of several joint debtors to confess a judgment without impairing the legal remedies of the creditor against the others who do not join in the confession.

§ 1278 was passed with reference not only to § 1273, but also to 738 of the Code, which authorizes a form of judgment by confession "after action" through the medium of a cognovit or offer. There is no cogent reason why the new rule introduced by § 1278 should not be held to embrace "confessions" made through the medium of an offer to allow judgment. They are all confessions of judgment authorized by the Code, serve the same purpose, and differ only in name and form. *Kantrowitz v. Kulla, ante*. The new provision is remedial in its nature, and should be liberally construed to give it efficiency, according to its evident spirit and intent. *Id.*

It was held in this case that a judgment entered against one joint debtor upon his offer of judgment does not merge the debt, or bar the remedy of the creditor against the other debtor who was not included in the offer and judgment.

A partner who has made an offer of judgment has no authority, as

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a copartner of the other defendants, to confess a judgment for them. The implied agency, resulting from the relation of the parties, does not extend to the performance of such an act. He can only bind himself. *Bredenbecker v. Mason, ante*. Where the partner employs an attorney to appear for all the defendants, and such attorney serves an offer of judgment in that capacity, without fraud or collusion, a judgment entered against all of them upon such offer is technically regular and, within the precedents, will be sustained. *Id.*; *Grazebrook v. McCredie*, 9 Wend. 437; *Griswold v. Griswold*, 14 How. 466. To authorize an entry of judgment upon an offer signed by a special agent, some proof of authority must accompany the act, and make a part of the proceedings and record in the case. *Id.*

§ 738 of the Code allows a defendant to offer to permit judgment to be taken against himself, but it certainly does not allow him to make an offer whereby judgment may be entered against a business firm, of which he is a member. *Rich v. Roberts*, 18 N. Y. C. P. 205; *Garrison v. Garrison, ante*. Where copartners are sued, one partner cannot bind the other members of his firm by offering to allow judgment in any action against the firm, *Weed v. Bergstresser*, 2 L. Bull. 55; *Binney v. LeGal, ante*, except where there is evidence that the copartner authorized his partner to make the offer, or assented thereto. *Rich v. Roberts, ante*.

In *Binney v. LeGal, ante*, it was held that one partner has no power to make an offer to the plaintiff to take judgment, under the Code, on behalf of himself and his copartner without some evidence from which it is to be inferred that his copartner authorized him to make the offer, or assented to it. Where an attorney appears for both, and there is no contrivance in employing him to appear, his appearance on the record may make the judgment regular.

Severance.—In *Bradbury v. Winterbottom*, 13 Hun, 536, the plaintiff alleged two causes of action separately. The defendant by his answer denied his liability upon the second cause of action, and served an offer to permit judgment to be taken against him for the amount claimed under the first cause of action. The answer, by failing to refer to the first cause of action, admitted the claim contained therein. The plaintiff moved to sever the action in reference to the claim therein alleged. The application was denied under a misapprehension of the effect of granting the relief sought, occasioned by the offer which it was supposed must be retained to prevent the plaintiff from recovering costs, and to secure them to the defendant, if successful in resisting the second cause of action. From the denial of the motion, the plaintiff appealed.

When a severance is made, if an offer covering the separate claim has been accepted, the costs allowed in granting judgment for the sum

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tendered would be to the time of such acceptance, and if no acceptance was given, then to the time of granting the order severing the action. If the plaintiff, on proceeding as to the severed claim, does not succeed the defendant will be entitled to costs, because as to it the action proceeds as though it had been brought only to recover such claim, and the offer will not give the defendant more protection from, or right to, costs than the statute confers. The offer in such case accomplishes nothing.

Bar.—In *Robinson v. Markes*, 19 Hun, 325, the facts involved in the controversy are as follows: The plaintiffs, in 1877, brought an action against the firm of Silliman & Co., to recover about \$12,000 for various notes and drafts made by that firm. Among them, there was described a note for \$2,500, made by that firm to the order of the defendant. The complaint alleged that this note was wholly unpaid, except the sum of \$122. Silliman & Co. denied that plaintiffs had any claim against them upon this note, but averred that this note was given to plaintiffs as collateral security. Accompanying their answer, they made an offer of judgment, under § 738 of the Code, for the amount claimed by plaintiffs in the complaint after deducting this note. The plaintiffs accepted this offer, and entered judgment upon it, against Silliman & Co., for \$11,222.27. They then brought the present action against the defendant who was the endorser of this note; and the question is, whether the judgment against Silliman & Co. bars a recovery against the endorser.

The legislature cannot have intended, by § 738 of the Code, after an acceptance of the offer made by defendant for a less sum than the entire claim, that a plaintiff should be again permitted to sue for the rejected portion of the claim. The admission of the plaintiff, by the acceptance of the offer, stands in the place of a verdict of the jury upon the entire complaint. Where the complaint has never been amended by striking out such clause, the sum received in compromise includes the whole number of causes of action described therein; and, if in such case the plaintiff cannot sue the makers, he cannot sue the endorser upon the rejected claim.

Where there is no proof, nor any stipulation between the parties by which it is agreed that any part of the cause or causes of action shall be withdrawn from the contemplation of the parties in making the compromise, the case does not come within the authorities in which a party is permitted to bring a new action for a severable cause of action sued on, or alleged by way of counterclaim in a former action, upon its being made to appear in court, either by parol evidence or by stipulations, that such cause of action was withdrawn, and not litigated in the trial of the former action. *Davies v. Mayor, etc.*, N. Y., 4 N. Y. C. P. 295; *Kerby v. Daly*, 63 N. Y. 659; *Knox v. Hexter*, 71 Id. 461.

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There can be little doubt that, in the absence of proof of such withdrawal, a general verdict or judgment would be a bar to a former suit on any cause of action or counterclaim pleaded in the action in which the judgment was had. *Davies v. Mayor of N. Y.*, *ante*; *Hopf v. Myers*, 42 Barb 270.

A judgment entered upon an offer of compromise, certainly, cannot put a plaintiff in a better position than he would have been with a verdict for the same amount, in the absence of any proof that a portion of the claim embraced in the complaint was withdrawn and not litigated.

Smith v. Jones, 15 John. 229; *Farrington v. Smith*, Id. 432; *Miller v. Covert*, 1 Wend. 487; *Guernsey v. Carver*, 8 Id. 492; *Stevens v. Lockwood*, 13 Id. 645; *Davies v. Mayor of N. Y.*, *ante*.

In the last cited case, the plaintiff brought an action against the defendant to recover quarterly installments of \$500, each due on the first days of February, May, August, and November, 1877. The defendant served an offer to allow judgment to be entered against him for the principal sum of \$1,000, with interest, besides the costs and disbursements accrued and incurred in this action to the date of the offer. This offer the plaintiff accepted and entered judgment accordingly. Afterward the plaintiff brought this action to recover four quarterly installments of said rent claimed to have become payable on the first days of August and November, 1877, and February and May, 1878. The court, at special term, found for the defendant, and dismissed the complaint, holding that the claim for rent falling due August 1 and Nov. 1, 1877, having been made a part of the plaintiff's cause of action in the former suit, compromised by the offer, became merged in the judgment entered therein, so that the plaintiff's action in this case, so far as that portion of his claim is concerned, is barred by the judgment. This case went up to the court of appeals, and it was there held that a general offer of judgment accepted, upon which judgment has been entered, precludes the party accepting it from bringing a new action for any part of the claim embraced in the complaint, and which might have been litigated in the action. 93 N. Y. 250. The offer, under the Code, is made to save litigation. The party to whom it is made may accept or reject it. If he accepts it, and is afterwards permitted to bring a new action and sustain it by proof that the whole claim originally made was recoverable, or that the amount offered was due on one of several causes of action embraced in the original action, it would or might destroy the only consideration upon which the other party acted in making the offer. *Non constat* that the offer would have been made except upon the view that its acceptance would extinguish the entire claim. In this case, the defendant intended to permit judgment for the amount of the two quarters rent prior to May 1, 1877, and not for the rent for the two quarters commencing May 1, 1877, which was also embraced in the action.

JOHN CODDINGTON, Assignee, etc., Appellant, v EUNICE J. BOWEN, Respondent.

THEODORE H. CODDINGTON, Appellant, v. SAME, Respondent.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Husband and wife. Employment.*—While the husband and wife are acting in good faith, and not to defraud creditors, she may employ him to conduct her business affairs, and the profits inure to her, and not to his, benefit.
2. *Costs. Discretionary.*—The referee's report cannot be added unto, by way of costs, by the judgment, where the referee fails to award costs in cases where they are discretionary.

This action was originally brought against the defendant and her husband; but her husband died, and the case was continued against her.

The material facts are substantially the same in both actions.

Appeal by the plaintiff in each action from parts of a judgment entered on the report of a referee.

D. C. Hyde, for appellant.

W. M. Bates, for respondent.

MACOMBER, J.—The plaintiff, James Coddington, is the general assignee for the benefit of the creditors of John S. Bowen, and also assignee of a judgment recovered by the Traders' National Bank of Rochester, against John S. Bowen.

Certain real estate passed to the assignee for the benefit of the creditors of John S. Bowen, known as the mill property, situate in the village of Spencerport, N. Y. After

Opinion of the Court, by MACOMBER, J.

the assignment, the milling business was permitted to be continued by the county judge of Monroe county.

The property was finally sold by the assignee on the 17th day of February, 1880, and was bid in by Willis D. Rich, he being the highest bidder therefor. Subsequently Rich and wife conveyed the premises to the defendant, Eunice J. Bowen. Thereafter Eunice J. Bowen continued the business of evaporating fruit in the establishment known as the old Catholic church in the village of Spencerport, which was leased of one Thomas Cushman. This business was profitable mainly through the labor, energy and skill of the husband, John S. Bowen, who was the general manager of the enterprise.

In the action secondly above entitled, the plaintiff is a judgment creditor of John S. Bowen.

Certain letters patent, of which John S. Bowen was inventor, had been transferred through other parties to Eunice J. Bowen, which the referee declared to be fraudulent as against creditors. In all other respects he has dismissed the complaint in each case.

The matters presented on this appeal are questions of fact wholly. The referee has found, as his conclusions, that the title of Eunice J. Bowen to the real estate described is good, and that it was obtained without fraud, and that the business carried on by her through the agency of her husband was legitimately and properly done, and that no right of action has accrued to either of the plaintiffs through any matter relating thereto. In this respect he seems to be supported by a clear preponderance of the evidence. It is true that the plaintiffs were compelled, as their counsel complain, to rely for the maintenance of their actions largely upon the testimony of parties in hostility to their claim.

Nevertheless, this evidence so adduced must be treated as reliable when not overcome by other proofs and as amply sufficient to sustain the judgment of the referee. The learned referee is manifestly correct in his conclusion as

stated in his opinion: that it is permissible to a wife to employ her husband to conduct her business affairs, and that the profits thereof inure to her benefit, and not to the benefit of her husband, so long as the parties are acting in good faith, and not for the purpose of defrauding creditors. *Abbey v. Deyo*, 44 N. Y. 343.

Inasmuch as no appeal has been taken by the defendant from the judgment, any consideration of the question arising out of the letters patent is rendered unavailing.

We observe, however, that in each of the cases the learned referee allows costs to the plaintiff to be paid from the proceeds realized from the sale of the letters patent, and not otherwise, and the residue, if any, which should be derived from the sale of the patent, to be applied upon the judgment held by each plaintiff. In neither report does he award costs to the defendant.

Yet in the Case of James Coddington, though no costs are allowed to the defendant Eunice J. Bowen in the decision, they are allowed to her in the judgment which was entered upon that decision. This sum is \$307.47. It was discretionary with the referee to award costs to either party, but having failed to do so, it was not competent for the report to be added unto by the judgment, which seems in form to have been settled before him. To this extent the judgment should be modified.

In the Case of Theodore H. Coddington, the judgment follows the decision and is correct.

The judgment in the Case of James Coddington is corrected by striking therefrom the sum of \$307.47 costs so the defendant, and as thus modified, affirmed, without costs to either party.

In the Case of Theodore H. Coddington, the judgment is affirmed, with costs to the respondent.

All concur.

Opinion of the Court, by MACOMBER, J.

In the Matter of HIRAM P. ABBEY, a supposed lunatic.

Supreme Court, Fifth Department, General Term, June 22, 1889.

Insane Persons. Lunacy proceedings.—Upon a return of the commission on an inquisition of lunacy, § 2336 of the Code calls upon the court, before which the proceeding is pending, for the exercise of its discretion; and the conclusion of the county judge, in such case, where the evidence raises a question for the consideration of the jury, ought not to be reversed, for the reason that it rested to a very large extent at least, in the discretion imposed upon him by law.

Appeal from an order of the county court, denying a motion to confirm the verdict in favor of the supposed lunatic, and ordering a trial of the issues to be had in the county court by a jury.

FRANK HAMLIN, for the petitioner, respondent.

Spencer Gooding for the supposed lunatic, appellant.

MACOMBER, J.—Twelve of the jurors signed a verdict that Mr. Abbey was competent to manage his affairs, and was not a lunatic.

Upon motion by his counsel for confirmation before the county judge, it was claimed on the part of the petitioner, who is a son of the supposed lunatic, that the verdict was against the weight of the evidence, and, also, that it should not be confirmed because of certain irregularities on the part of some jurors while in consultation. By section 2336 of the Code of Civil Procedure it is provided: "Upon the return of the commission, with the inquisition taken thereunder, or the rendering of the verdict of the jury, upon the question submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing or make such final order upon the petition as justice requires."

Statement of the Case.

This section seems to call upon the county court for the exercise of its discretion in the premises. *Jackson v. Jackson*, 37 Hun, 309.

The judgment of the county court is supported by abundant and satisfactory proofs that Mr. Abbey, at the time of the inquisition, was of unsound mind and incompetent to manage his affairs. The evidence leading to the opposite conclusions raised a fair question for the consideration of the jury. But under the peculiar phraseology of the statute in question, and in accordance with the decision already cited, the conclusion of the county judge ought not to be reversed, for the reason that it rested to a very large extent at least in the discretion imposed upon him by law. This renders it unnecessary to consider the irregularities in the jury room complained of.

The order should be affirmed, with costs of the appeal to abide the final award of costs.

All concur.

HENRY MACKEY *et al.*, Respondents, v. JULIA A. WEBB,
Appellant.

Supreme Court, Fourth Department General Term, July 20, 1889.

1. *Husband wandife. Liability.*—A married woman is liable for work and materials furnished at her husband's request, if applied to her property in her presence and without objection; and the law will imply a promise to pay for the materials furnished and services performed on her separate property. .

See note at end of case.

2. *Questions of fact. Credibility.*—The credit to be given to evidence of interested witnesses is a question for the jury.

Appeal from the judgment of the county court affirming a judgment rendered by a justice of the peace.

E. P. Webb, for appellant.

E. C. Emerson, for respondents.

MARTIN, J.—Whether the evidence was sufficient to justify the jury in finding that the labor and materials furnished by the plaintiffs were furnished to the defendant, and in holding her liable therefor, is one of the questions presented on this appeal. The work and materials were furnished at the request of the defendant's husband. Nothing was said between the plaintiffs and defendant's husband as to who was to pay therefor. The plaintiffs were employed in making improvements on the defendant's separate property. The defendant was present when the work was performed and materials were furnished, and made no objection. She at one time cautioned them about placing stone upon her garden, and she and her husband consulted together about the work and plan of the improvements to her house.

The defendant's husband testified that his wife did not authorize him to have the work done or the materials furnished. The jury evidently did not give credit to this evidence. The question as to what credit was to be given to this evidence was for the jury. *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Koehler v. Adler*, 78 Id. 291; *Lesser v. Wunder*, 9 Daly, 73; *Cornell v. Markham*, 19 Hun, 275; *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 Id. 609; *Brooklyn Crosstown R. R. Co. v. Strong*, 75 Id. 591; *Honegger v. Wettstein*, 94 Id. 252; *Becker v. Koch*, 104 Id. 395; 5 N. Y. State Rep. 688; *President and Directors of the Manhattan Co. v. Phillips*, 109 N. Y. 383; 16 N. Y. State Rep. 199; *Munoz v. Wilson*, 111 N. Y. 295; 19 N. Y. State Rep. 372.

Hence the question is, whether the other evidence in the case was sufficient to uphold the verdict. In the case of *Fairbanks v. Mothersell* (60 Barb. 406-408), which was a case very similar to this, the court said: "The case stands simply upon an employment of plaintiff by the husband to

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work for his wife on her separate property, without any express agreement whether he should be paid by the husband or wife. The defendant knew the plaintiff was at work there, and saw the kind of work he was doing, and the law will imply a promise on her part to pay for the services if it was, in fact, her work." This question was held to have been rightly decided in that case in *Perkins v. Perkins* (7 Lans. 27; 62 Barb. 539). See, also, *Fowler v. Seaman* (40 N. Y. 592), *Garretson v. Seaman* (54 Id. 652), *Husted v. Mathes* (77 Id. 388). We are of the opinion that the authorities cited justify us in upholding the judgment appealed from.

We are also of the opinion that the evidence was sufficient to sustain the judgment for the amount recovered. As no other errors are claimed by the appellant, we think the judgment should be affirmed.

Judgment of the Jefferson county court affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concur.

NOTE ON THE RIGHT OF A MARRIED WOMAN TO COLLECT FOR SERVICES
RENDERED FOR, OR IN THE FAMILY OF HER HUSBAND.

The acts relating to "the rights and liabilities of husband and wife," which have enabled her to own property and carry on a sole and separate business, and perform services pertaining to such property and business, have not entirely released her from her duty to render household services for her husband, nor entitled her to demand remuneration therefor. What effect these acts have had upon this common law duty of the wife will be seen from an examination of the law and the decided cases.

For loss of services.—At common law when a married woman was injured in her person, she was joined with her husband in an action for the injury, and in such action nothing could be recovered for loss of service or for the expenses to which the husband had been subjected in taking care of and curing her. For such loss of service and expenses the husband alone could sue. But the statute of 1860 effected a radical change of the common law which gave the husband the right to the labor, services and earnings of his wife. Her services in the

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household, in the discharge of her domestic duties, still belong to the husband, and, in rendering such services, she still bears to him the common law relation. So far as she is injured as to be disabled to perform such service for her husband, the loss is his and not hers; and for such loss of service, he and not she can recover of the wrongdoer. *Brooks v. Schwerin*, 54 N. Y. 343. But when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as though she was a *femme sole*; and, so far as she is disabled from performing such service by any injury to her person, she can in her own name recover a compensation against the wrongdoer for such disability as one of the consequences of the injury, under the seventh section of the act of 1860 which provides that "any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole," and the money recovered shall be her sole and separate property. *Id.* In this case the married woman was earning in a humble capacity ten shillings a day, and it was held that, so far as she was disabled to earn this sum, the loss was hers, and the jury had a right to take it into account in estimating her damages.

There is nothing in conflict with these views in the case of *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47. In that case, there was no claim that the plaintiff, who was a married woman, was at the time of the injury carrying on any business or trade, or engaged in any service on her sole and separate account, or that she was earning any money, which, under the laws of this state, she could claim as her own.

In *Dawson v. The City of Troy*, 49 Hun, 322, an action was brought by a married woman for loss of services, resulting from personal injuries. She, after dark in the evening, while walking upon River street in the city of Troy, slipped upon the ice, fell and was injured. At the time of the injury, she was working in a mill and always collected her wages, but had no property except what she earned. And it was held that these facts did not justify the court in charging the jury, that, if the plaintiff had been allowed to make bargains in her own behalf for her labor and services, and had been accustomed to accept and appropriate the compensation therefor, as she saw fit, with the approval and consent of her husband, then she could recover for any loss in this respect as there was no evidence that she was carrying on any business, trade or labor upon or for her sole or separate account, and the fact that she was collecting her wages was quite consistent with her collecting them for her husband.

For services.—In *Whitaker v. Whitaker*, 52 N. Y. 368, the facts were that the husband gave his wife a note for \$4,000, the only consideration of which was that the wife, aside from her household duties, had

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aided in the out-of-door work on her husband's farm, and it was given to her for the purpose of providing for her support and maintenance. The husband died, and after his death she presented this note as a claim against his estate. And it was held that she could not recover. In the opinion, the court said, that, to uphold notes given under such circumstances, would be likely to lead to the perpetration of frauds; and that if a wife could be said to be entitled to a higher consideration or compensation because she labors in the field instead of in her household, the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services.

In *Beau v. Kiah*, 4 Hun, 171, a married woman, who was living with and keeping house for her husband, took care of her mother and sister who were sick at the house of her father, who promised to pay her for her services. In an action brought by her to recover for such services it was held that she was properly nonsuited, as her services belonged to her husband, and he alone could maintain the action.

When a married woman does any work for a person other than her husband, her earnings are not in every case separate. If it was so, she would be entitled to be paid by her husband when she does work for him, nurses him in sickness, or sews on his buttons in health. All business carried on, or labor performed by her, is not necessarily on her separate account.

In *Cuck v. Quackenbush*, 13 Hun, 107, an action was brought by a daughter of the deceased against his executor to recover for services rendered by her in attending upon her father during his last illness. She was then married and living with her husband. It was held that the husband, and not the wife, was the proper person to bring the action. See also *Beau v. Kiah*, *ante*; *Birkbeck v. Ackroyd*, 11 Hun, 365; 4 W. Dig. 576.

In *Carpenter v. Weller*, 15 Hun, 134, plaintiff and her husband lived for twenty-three years with and in the house of her brother. She assisted in the ordinary work of the house, in milking the cows, and in the dairy. An action was brought by her, after her brother's death, to recover from his administrators the value of her services rendered during the previous six years. And it was held that she could not maintain the action. As her husband had not relinquished the claim to her services and earnings, and she was not carrying on a business for herself, he was entitled to them and was the proper party to bring the action. See *Beau v. Kiah*, *ante*.

In *Young v. Harcourt*, 22 W. Dig. 483, a claim was presented by a married woman for board, etc, furnished defendant's intestate, who was her own brother. The latter and her husband had been in partnership, and, the summer before the brother died, they settled their

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matters and gave receipts. At that time the husband said that the board bill was not to be included in the settlement; that he wanted his wife to have it. And her brother said that she ought to have it. It appeared that the husband supported the family, and that the wife rendered only such services as are usual in the household. And it was held that the claim for board and washing belonged to the husband, and that his title thereto was not divested in her favor by the conversation that occurred between him and the intestate.

In *Mason v. Libbey*, 19 Hun, 119, a business for which the capital was originally furnished by the wife to the husband in 1833, was carried on by them, though it was attended to almost exclusively by the wife. With the profits of the business, land in New Jersey was purchased in 1851, and the title thereto taken in the husband's name. In 1853 the husband executed a deed of the land directly to his wife. By the laws of New Jersey, the wife under this deed could hold, but could not convey the land. Subsequently the husband and wife joined in a deed of such land, and the proceeds of such sale were paid over to and retained by the wife. And it was held that the husband might acknowledge the equitable claim of his wife in the profits of the business and transfer to her property acquired through the use of such profits.

It is doubtless true that the earnings of the wife at the time the business was carried on belonged to her husband. But, in the absence of claims or objections on the part of his creditors, he could surrender a portion of these earnings to his wife. He might acknowledge her equitable claims to them and could consent to the acquisition of property though them and to her own use. *Kelly v. Campbell*, 2 Abb. Ap. Dec. 494.

In *Reynolds v. Robinson*, 64 N. Y. 589, an action was brought by the husband to recover the value of services alleged to have been performed by himself and his wife in caring for one James Hill. Said Hill was a farmer and adopted Lovella Hughes and brought her up as his daughter. She married the plaintiff, and, after the marriage, plaintiff took Hill's farm to work on shares and subsequently purchased it. Hill continued to live with plaintiff, paying for his board. He for a long time was afflicted with a cancer, and required a great deal of care, nursing, bathing and washing of linen and clothing. Plaintiff's wife rendered these services, which were performed at the request of Hill, who promised to pay what they were worth. The services were worth \$4,342. And it was held that, where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, all her services and earnings, in the absence of proof of any special agreement, belong to her husband, and he can maintain an action to recover therefor.

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In this case the plaintiff's wife rendered the services in his house to a boarder therein. She was engaged in no business or service on her own account. She was in charge of his household, and, as part of her household duties, rendered the services to a person in her husband's house by contract with him. She was then working for her husband and not for herself, or on her own separate account. Notwithstanding the act of 1860, she can still work for her husband, and devote all her time and service to him. These views are not in conflict with *Brooks v. Schwerin, ante*. In that case a poor woman went out to work by the day, earning wages, and it was held that the wages thus earned in labor outside of her household, and entirely disconnected from her household duties, belong to her. But if she aids him in carrying on his business, in the absence of special proof, all her services and earnings belong to him. Even under such circumstances, the husband may covenant and agree that his wife shall receive pay for her services on her own account; but in the absence of some arrangement to that effect, the inference of law and fact is that she was working for her husband in the discharge of her marital duties. *Id.* And even where an agreement is made between the husband and the third party that compensation for services rendered by his wife to the other shall be made by a provision in the will of the latter in favor of the wife, in case a provision is made sufficient only to compensate in part for her services, the husband has after the death of such third party, a cause of action for the balance against his personal representatives. *Id.*

It was not intended by anything that was said in this case to intimate that a wife could demand payment from her husband for any services rendered under the circumstances mentioned herein; but that, with his consent, she could demand and receive, and hold to her separate use, payment from the persons thus taken into his house, for any services she there rendered to them in taking care of and nursing them. *Coleman v. Burr*, 93 N. Y. 17.

The acts of 1848 and 1849 did not change the rule of the common law giving the husband the right to the services and earnings of his wife, in cases where she had no separate estate, and where her labor was not connected with the use of her separate property. *Birkbeck v. Ackroyd*, 74 N. Y. 356. This state of the law left a wife, who might be dependent upon her own labor for her support and the support of her children, without the legal power to control her earnings, and they were liable, as they were before these acts were passed, to be appropriated by the husband.

The act of 1860 was intended to remedy this defect in the prior laws, but it does not wholly abrogate the rule of the common law. She may still regard her interests and those of her husband as identical, and

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allow him to claim and appropriate the fruits of her labors. The bare fact that she performs labor for third persons, for which compensation is due, does not necessarily establish that she performed it, under the act of 1860, upon her separate account. The true construction of the statute is, that she may elect to labor on her own account, and thereby entitle herself to her earnings; but, in the absence of such an election, or of circumstances showing that she intended to avail herself of the privilege and protection conferred by the statute, the husband's common law right to her earnings remains unaffected. *Id.*

When the labor is performed under a contract with a wife and by the contract payment is to be made to her, the inference would be strong, if not inclusive, of her intention to avail herself of the protection of the statute. So where the wife is living apart from her husband, or is compelled to labor for her own support, or the conduct or habits of the husband are such as to make it necessary for her protection that she should control the proceeds of her labor, the jury may well infer that her labor was performed on her separate account. But, where the husband and wife are living together, and mutually engaged in providing for the support of themselves and their family, each contributing by his or her labor to the promotion of the common purpose, and there is nothing to indicate an intention on the part of the wife to separate her earnings from those of her husband, her earnings, in such case, belong, as at common law, to the husband, and he may maintain an action in his own right to recover them. Where the wife is engaged in a business, as that of a trader, and it is conducted in her name, there is no room to question her right to the avails and profits. But the duty still rests upon the husband to maintain and support the wife and their children; and it is not necessary, in order to give the wife the protection intended by the statute of 1860 to hold that, irrespective of her intention, her earnings, in all cases, belong to her and not to the husband; and the language of the act does not admit of such interpretation. *Id.*

In *Roblee v. Gallentine*, 19 W. Dig. 153, it was held that, in the absence of an express agreement the services performed by a married woman as a member of the family of her father-in-law are impliedly gratuitous. *Williamson v. Hutchinson*, 3 N. Y. 312. But if the services are to be paid for, the compensation belongs to her husband; *Coleman v. Burr*, 25 Hun, 239; *Affirmed*, 93 N. Y. 17, unless he has transferred to her his right thereto, or consented that she might receive the compensation.

In *Derr v. Cooley*, 20 W. Dig. 109, a mother, in contemplation of death, consigned her child to a married woman, to be brought up by her. The husband brought an action to recover compensation out of the infant's estate for her care and support while she lived in his family.

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And it was held that presumptively the services of his wife in his own household were not rendered on her separate account, and in rendering them she bore to him the common law relation, *Coleman v. Burr*, ante but that *prima facie* he is entitled to compensation for the care of the child, bestowed by his wife at his home; and that declarations by the wife that she, with her husband's permission, agreed to render the services gratuitously, are mere hearsay as against him.

In *Burley v. Barnhard*, 45 Hun, 588, the plaintiff was the wife of Edwin Burley, the son of Gardner Burley, defendant's testator. She presented a claim to the executor for services rendered in nursing and caring for the testator during his sickness. The claim was rejected and duly referred under the statute. The plaintiff and her husband occupied the farm of the deceased, working the same upon shares, and the deceased lived with them. The latter had a sun-stroke, sickness followed, and he suffered much pain, was irritable and required considerable attention. The plaintiff cared for him as a nurse during the time mentioned in her claim under an express contract to pay her for her services. At the time the services were performed, she was living with her husband upon the farm doing the ordinary household labors of a wife having no separate estate or business. And it was held that, under the provisions of the act of 1860, a married woman is authorized to perform labor or services and have the earnings for her sole and separate property; that this provision is not understood as wholly abrogating the rule of the common law entitling the husband to the services and earnings of the wife: and that she may still allow him to claim and appropriate the fruits of her labor, and in the absence of an election on her part to labor on her account, or of circumstances showing her intention to avail herself of the privilege conferred by the statute, the husband's common law right is unaffected. It consequently becomes a question of fact as to whether the services performed by her were rendered under an understanding at the time by the parties to the agreement that the compensation was to be paid to her for her separate use and property; and this fact has to be determined from the facts and circumstances of the case. *Id.*

In this case, it appeared that, two or three years prior to the sickness of the testator, plaintiff's husband had told her that she might have whatever the testator would pay for taking care of him. And it also appeared that the testator promised to pay the plaintiff, and that on one occasion he authorized her husband to say to her that, if she would stay, he the testator would pay for her services, and that the husband so stated to her subsequently. And it was held that there were some circumstance indicating an intention on the part of the wife to separate her earnings from those of her husband, which, taken

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in connection with the promise of the deceased to pay her for her labor, justified a finding that she was entitled to maintain the action.

It is competent for the husband to make an arrangement with his wife by which she shall have the money paid for board and the profits resulting from the keeping of poultry. *Matter of Kinmer*, 47 Hun, 635.

The earnings of the wife, obtained in the poultry business and keeping boarders, under an agreement previously made that she should be entitled to them, belong to her and form a part of her separate estate. *Coleman v. Burr*, *ante*; *Reynolds v. Robinson*, *ante*. As between themselves, a husband may relinquish to his wife his right to her earnings, even in his own household, so that she can hold them to her separate use. *Coleman v. Burr*, *ante*; *Matter of Kinmer*, *ante*. In the latter case, the contract was not that the wife shall be paid for performing her duty, but that she shall have as her separate earnings the money received for the board of a person for whom she was not obliged to work, and which was to be paid to her individually.

It is undoubtedly true that a husband is primarily entitled to the services of his wife in respect to his household duties, and that she cannot recover for inability to perform those duties.

Blachinska v. Howard Mission and Home, etc., 56 Hun, 322. In such a case, the right of action will belong to the husband. But that a married woman is entitled to recover for the loss of any wages which she might have earned outside of her household duties, where it appears that she has been accustomed to make such earnings, seems to be clearly established by the case of *Brooks v. Schwerin*, 54 N. Y. 343, where it was held that the services of a wife in the household in the discharge of her domestic duties still belongs to her husband, and so far as injuries disable her from performing such services for her husband, the loss is his, not hers. But when she labors for another, her services no longer belong to her husband; whatever she earns belongs to herself, and so far as she is disabled from performing such services by any injury, she can recover for the loss.

The presumption which arises from the rendition of services that they belong to her husband, may be rebutted by evidence showing the special circumstances of the case and that rule should not apply.

It is sufficient to rebut this presumption, where the wife has been working for her husband, but outside of her household duties, and has been accustomed to receive pay therefor from him.

Under the law as it now stands there is no distinction between services performed for a husband and for another party, where there is a distinct agreement for compensation. *Blachinska v. Howard Mission and Home*, etc., 56 Hun, 322. If a wife has been accustomed to work at a trade or a business for other parties, and has received the re-

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muneration therefor, its loss can be given in evidence as an element of damage in an action for injuries caused by negligence. And so, where she is accustomed to receive compensation for the work done for her husband, there is no reason why it may not be taken into consideration by the jury in determining the amount of damages.

A husband may permit his wife to labor for her own account. He may give her the proceeds she has earned, or allow her to appropriate them to her own use. *Mason v. Libbey, ante*; *Donovan v. Sheridan*, 37 Super. 256.

A husband may permit his wife to engage in the service of another, for herself, on her own account, and in her own right, and he may consent to the use of her property for another's benefit, under an arrangement between the parties that recompense should be made to her. *Snow v. Cable*, 19 Hun, 280. He may permit her to engage in business on her own account, and have her own personal earnings. In such case the avails or proceeds are her own; and she may claim them, and recover them the same as though she was a *femme sole*. *Id.*; *Brooks v. Schwerin, ante*; *Birkbeck v. Ackroyd, ante*; *Adams v. Curtis*, 4 Lane. 164. The act of 1860 expressly empowers a married woman to labor on her own separate account, and to have the fruits of it in her own right. *Snow v. Cable, ante*.

In *Bowers v. Smith*, 54 Hun, 639, an action was brought for food furnished the deceased and plaintiff recovered. The facts are as follows: Prior to this action the wife of the present plaintiff recovered in an action against these defendants for services, board and rent furnished the deceased. On the trial of the former action he was a witness and testified that he was present when his wife made out her bill against the estate for the claim sought to be recovered in her action, and when she verified the same; and that he told her that if she took good care of the deceased she could have all there was for nursing and board. And it was held that it is settled that such an agreement between husband and wife is valid. It is an agreement that if the wife will act as nurse and take care of the invalid she may have or receive the compensation for her services as well as for his board. The facts show an election on the part of the wife, assented to by her husband, to board and take care of the deceased on her own account.

It was further held in this case that a recovery by the wife on her claim for services and board of the decedent against his executors, is a bar to an action by the husband for any matter involved in the same demand.

The services of a wife, while in the discharge of her domestic duties, still belong to the husband. *Hook v. Kenyon*, 55 Hun, 598; *Brooks v. Schwerin, ante*. It has also been held that, where boarders are taken by the husband, and his wife takes charge of his establishment, and

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thus aids him in carrying on his business, in the absence of special proof, her services and earnings belong to the husband. But even under such circumstances, the husband may covenant and agree that his wife shall receive pay for her services on her own account. *Reynolds v. Robinson, ante*. A married woman owes no duty to her husband to carry on any business in his house or elsewhere for the purpose of earning money for him. *Coleman v. Burr, ante*. When she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as though she was a *femme sole*. *Brooks v. Schwerin, ante*; *Matter of Kinmer*, 47 Hun, 635. The use of her separate property belongs to the wife. *Hook v. Kenyon, ante*.

In this case, the wife was also the lessee or owner of the house in which the boarder had a room and was boarded, and therefore not only performed services in furnishing board, but also contributed the use of her separate property. Under such circumstances, it was held that she was justly and equitably entitled to share in the money to be received for such board and use of her house.

Under the circumstances disclosed in *Hook v. Kenyon, ante*, the defendant had a right and could legally make a contract by which the wife should receive a share of the proceeds of such board and use of room, for the use of her house and for her services, and since such contract was made and the plaintiff has promised to pay the defendants jointly for such board and use of room, with full knowledge of the agreement between the defendants, she cannot now insist that her debt was to the husband alone, and thus defeat the defendants' counterclaim.

Where a married woman is separated from her husband and supporting herself and apparently never receives any further attention or support from her husband after her separation from him, and while so separated enters into the service of a third person, her earnings belong to her and are recoverable by her and not by her husband. *Pursell v. Fry*, 19 Hun, 595; *Brooks v. Schwerin, ante*; *Adams v. Honness*, 62 Barb. 326; *Birkbeck v. Ackroyd, ante*.

It is competent for her to make a bargain with a third person for her services, and for compensation therefor, and after she has performed, it is too late for him or his representatives to repudiate the bargain and refuse to pay her the fair value of her services. *Pursell v. Fry, ante*; *Adams v. Honness, ante*; *Willets v. The Sun Mut. Ins. Co.*, 45 N. Y. 45.

In *Coleman v. Burr, ante*, an action was brought to set aside a deed of a farm of land made by the defendant to a third person, and by him to defendant's wife, on the ground that the deeds were made with intent to hinder, delay and defraud the creditors of the grantor, of

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whom the plaintiff was one. The defendant lived upon the land conveyed and had a family consisting of himself, his wife, and two children of his wife by a former husband, his two children by his wife, and his mother, who lived in a part of his house and whom he had engaged to support in consideration of a conveyance by her to him of a portion of this farm. His mother was about eighty years of age and had an attack of paralysis which substantially rendered her helpless. The care of her devolved mainly upon the wife, and her services in such care were onerous, exacting and disagreeable. It was agreed between the defendant and his wife that, if she would undertake to discharge the duty of taking care of his mother, she would be paid by him for her labor and services the sum of five dollars a week, which was no more than a fair and reasonable compensation for such labor and services. The mother lived after this agreement was made eight years and four months, and the compensation agreed upon amounted to \$2,175.

For the purpose of paying this sum, the defendant and his wife conveyed the farm to the third party for the nominal consideration of one dollar, and the grantee executed and delivered a deed of the same land to the wife for the same nominal consideration.

The contract between the wife and the husband, in reference to these services, would, at common law, have been void, as she could make no contract with her husband, and her services, whether rendered in her husband's family or elsewhere, absolutely belonged to him. *Gerry v. Gerry*, 11 Gray, 381; *Cramer v. Reford*, 17 N. J. Eq. 367; *Henderson v. Warmack*, 27 Miss. 830; *Shaeffer v. Sheppard*, 54 Ala. 244; *Glaze v. Blake*, 56 Id. 379; *Duncan v. Roselle*, 15 Iowa, 501; *Hay v. Hayes*, 56 Ill. 342. But modern legislation in this state has enlarged the powers of married women. By the acts of 1848 and 1849, the husband was deprived of that right to and control of his wife's property which the common law gave him. The purpose of these acts was to protect married women against unkind, thriftless or profligate husbands, by securing to them the separate and independent control of all their own property. But these acts went no further.

By chapter 90 of the Laws of 1860, still further protection was given to married women. It was the purpose of the provisions of this act to secure to a married woman, free from the control of her husband, the earnings and profits of her own business and of her own labor and services, carried on or performed on her sole and separate account, which at common law would have belonged to her husband. But it was not their purpose to absolve a married woman from the duties which she owes to her husband, to render him service in his household, to care for him and their common children with dutiful affection when he or they need her care, and to render all the services in her house-

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hold which are commonly expected of a married woman, according to her station in life. Nor was it the purpose of the statute to absolve her from due obedience and submission to her husband as head and master of his household, or to depose him from the headship of his family, which the common law gave him. He still remains liable to support his wife and responsible to society for the good order and decency of his household. He is to determine where he and his family shall have a domicile, how his household shall be regulated and managed, and who shall be members of his family. The statute above referred to touch a married woman in her relations to her husband, only so far as they relate to her separate property and business, and the labors she may perform on her sole and separate account. In other respects, the duties and responsibilities of each to the other remain as they were at common law. *Coleman v. Burr, ante.*

Whatever services a wife renders in her home for her husband cannot be on her sole and separate account. They are rendered on her husband's account in the discharge of a duty which she owes him or his family, or in the discharge of a duty which she owes to the members of his household. *Id.*

A married woman cannot enforce a contract made with her husband for the payment of services rendered by her for him in his household. *Coleman v. Burr, ante.* And where these services have been rendered in nursing and caring for the husband, or for any of the children of the husband and wife, a contract to pay for such services will have no consideration to rest upon, and the wife cannot retain property conveyed to her in payment of such services against creditors pursuing the same. *Id.* No distinction can be made between such services of the wife and those which she renders for one not strictly a member of the husband's family. It does not stand upon principle, but would be merely an arbitrary one. *Id.* While the wife cannot demand or receive payment, as against creditors, for services rendered in the care of her husband and children, it cannot be said upon principle that she can demand and receive payment for every service she renders in caring from time to time for visitors in her husband's house upon his invitation. She cannot stipulate for compensation, whenever she aids him in the discharge of a duty which he owes to an inmate of his house, though such inmate is not strictly a member of his family; nor can she lawfully demand a share of his property for her services, whenever she nurses in sickness one of his children of a former marriage, who is a member of his family. *Id.* In this case, the mother was properly part of the household. The husband was under a natural, legal and contract obligation to support her. He was under just as much natural, legal and moral obligation to support his mother as he was to

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support his own children. *Id.* And when, therefore, the wife renders a service in caring for her, she is engaged in discharging a duty which her husband owes his mother, and precisely the same kind of duty as he owes to his children and to his wife. In discharging this duty, she earns no money, she brings no increase to her husband's property and no income into the family. The services are rendered simply in the discharge of a duty which the husband owes to his mother, and, in rendering them, she simply discharges a marital duty which she owes to him. *Id.*

Whether or not a wife will do business or render service on her sole and separate account, depends upon her election, and not upon her husband's consent. *Id.* The acts of 1848, 1849 and 1860 should not be so construed that a married woman may make her husband her debtor every time she renders a service in his home to one lawfully there, but not strictly within the narrow circle of a normal family, consisting of herself, her husband and children. Such a construction will enable a married woman to absorb her husband's property before he knows it, and certainly before his creditors know it. *Id.*

A married woman owes no duty to her husband to go out of his house and render service for persons not members of his family; and she owes him no duty to carry on any business, in his house or elsewhere, for the purpose of earning money for him; and the purpose of the statute is fully accomplished if she is permitted to retain as her own, money or property obtained by her in such business or by the rendition of such services. *Id.* But when she renders service in the household in the discharge of a duty which she owes to her husband, or which he owes to another, who is an inmate of his family, and he receives no pay from the person to whom the service is rendered, and is entitled to receive none, and she brings no money or property by her service to her husband, she cannot stipulate with him for compensation from him, and the services thus rendered are not under the protection of the statute of 1860. *Id.* This furnishes a plain, clear rule, easily applied, which will secure the relief aimed at by the statute, without any embarrassing or disastrous consequences. *Id.*

In *Grant v. Green*, 41 Iowa, 88, it was held that a contract between the guardian of an insane husband and the wife, that the latter should care for the husband and receive a certain sum for her services, was without consideration and void because she owed the service independently of any contract. The service was such an one as she owed her husband by virtue of the relation existing between them.

She had no right to refuse to perform it, nor to demand compensation for performing it.

In *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47, it was held that the ser-

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vices and earnings of the wife belonged to her husband, unless she is carrying on a trade or business, or performing labor or services on her sole and separate account; and that, in an action to recover damages for a personal injury, he, and not she, is entitled to recover consequential damages from her inability to labor.

In this case an action was brought to recover damages for injuries sustained by a married woman while a passenger upon defendant's cars. As she attempted to get off, her clothes caught in the steps, and she was thrown down and dragged a considerable distance. The shock rendered her insensible for a short time; her back was bruised and she was lame and suffered pain in her back and hips, which has continued since without intermission. This lameness and pain at length resulted in psoas abscess, prostration and sickness. She has partly recovered, but is permanently disabled. There is no claim that she was, at the time of the injury, carrying on any business, trade or labor, upon or for her sole and separate account. And it was held that her services and earnings belong to her husband; and for loss of such services, caused by the accident, he may have an action.

The Laws of 1860 authorize a married woman to sue for the direct injury to her person or character, the same as though she was sole. But she cannot maintain such action, for even the direct and immediate damages, unless she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss.

The amendatory act of 1862 does not enlarge the rights of the wife, or detract from the rights of the husband or take from him the right to recover for the loss of service of his wife, caused by the wrongful act of another. Unless the wife is actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she has lost by reason of the injury, she has sustained no consequential damages; she has lost nothing pecuniarily by reason of her inability. *Filer v. N. Y. C. R. R. Co., ante.*

The cases of *Bertles v. Nunan*, 92 N. Y. 159; *Fairlee v. Bloomingdale*, 67 How. 292; *Kaufman v. Schoeffell*, 37 Hun, 140; *Noel v. Kinney*, 15 Abb. N. C. 403; *Barnett v. Harshbarger*, 5 N. E. Rep. 718; *Kniel v. Egleston*, 4 Id. 573, while giving a fairly liberal interpretation to these statutes, and the rights and obligations of married women thereunder, still hold uniformly to the doctrine that, in legal contemplation, the husband and wife are still one, and, as between themselves, can only make such contracts as are necessary to protect her separate estate.

In each of the cases of *Benedict v. Driggs*, 34 Hun, 94; *Granger v. Granger*, 41 Id. 638; and *Fairbanks v. Mothersell*, 60 Barb. 406, it appeared that the wife was possessed of a separate estate, and the acts

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there upheld were those especially relating to such estate. In the Matter of Reuter, 5 Dem. 162, the husband was a cheesemaker, and the wife aided him in carrying on this business during the season, so that the case was not distinguishable from Whitaker v. Whitaker, 52 N. Y. 368.

Statement of the Case.

LANIE M. PETRIE, Respondent, v. MORGAN PETRIE *et al.*,
Appellants.

Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Will. Testamentary capacity.*—The finding of the jury as to the testator's incapacity, upon conflicting evidence, on the issue of his capacity, will be sustained.
2. *Same.*—Though the testimony of the attorney, who drew the will, tends to show that the testator knew what he was about, and comprehended the character of the instrument he was making, and the acts and conversation of the deceased impressed the subscribing witnesses as rational, it cannot be said, as matter of law, that this part of the evidence is controlling, but it must all be taken together.
3. *Same. Undue influence.*—If the testator was not competent to make the will, it is immaterial whether or not there was undue influence.
4. *Witness. Section 829.*—An interested witness may testify to a conversation between decedent and another person, though mentioned in it, if he took no part therein.
5. *Same.*—A witness, after having detailed transactions with, or concerning, the deceased, may be allowed to state whether such transactions, as detailed by him, impressed him at the time as rational or irrational.
6. *Same. Subscribing witnesses.*—A subscribing witness cannot be asked directly or in effect to compare what he has not described with what he may have seen on previous occasions. If the party asking the question desires the benefit of the exceptional rule applicable to subscribing witnesses, the form of the question should distinctly indicate the fact.

Appeal from an order denying a motion made upon the minutes for a new trial.

The action is brought for the partition of certain real estate in the town of Vernon, Oneida county, owned by Nicholas H. Petrie at the time of his death. Petrie died on May 23, 1883, aged about eighty-seven years. The plaintiff is one of his heirs-at-law, and as such claimed to own an

undivided one-fourth of the real estate. The other heirs-at-law are made parties-defendant.

It is also alleged in the complaint that the defendant, Morgan Petrie, claims the whole of the premises under a will of said deceased, but that such will was not legally executed; that the deceased was not, at the time, competent to make a will, and that it was procured by undue influence. The defendants, Morgan Petrie and Kate Petrie, his wife, answered, setting up, among other things, the will.

The court, upon motion to settle the issues, ordered that three questions be submitted to a jury:

First. As to whether the will was, in form, properly executed.

Second. "Was the said Nicholas H. Petrie, at the time of the claimed execution of said paper, mentally competent to make a will and devise of real estate?"

Third. "Was the said paper, purporting to be a will, procured, or executed through or by any duress, undue influence or fraud?"

Upon the trial it was conceded that the will was, in form, properly executed, and the jury, by their verdict, answered the second question, no, and the third, yes.

Upon the coming in of the verdict, the defendants made a motion for a new trial "upon the minutes of the judge," on the ground that the verdict is contrary to the evidence, and is against the weight of the evidence, and that there is not evidence enough to sustain the verdict, and also on the ground that the verdict is contrary to law, and on the exceptions taken to the rulings of the judge upon the trial.

This motion was denied and the defendant, Morgan Petrie, appealed.

Edwin J. Brown, for appellant.

C. D. Prescott, for respondent.

MERWIN, J.—It is claimed by the defendant that the evidence was not sufficient to sustain the verdict on the ques-

tions of mental competency and undue influence. We are of the opinion that the evidence called for the submission to the jury of the question of mental capacity, and that it was sufficient to sustain the verdict in that regard.

The deceased, at the time of making the will, was of the age of eighty years and upwards, and many circumstances were shown in regard to the testator, occurring at or about that time or before, indicating an enfeebled mental condition, and the force or weight of these circumstances, as applicable to the issue, was peculiarly for the jury to determine. The testimony of the attorney who drew the will tends to show that the testator knew what he was about, and comprehended the character of the instrument he was making, and the acts and conversation of the deceased impressed the subscribing witnesses as rational. Still it cannot be said as matter of law that this part of the evidence is controlling. It must all be taken together. No fault is found with the charge of the court. The result arrived at by the jury on this question should not be disturbed.

It is doubtful whether the evidence is sufficient to sustain the finding on the subject of undue influence. Still that would not be sufficient ground for a new trial as long as the finding of incapacity is sustained. The will would fall irrespective of the question of undue influence. If the testator was not competent to make it, it is not material whether or not there was undue influence.

It is claimed by the defendant that the court erred in allowing the plaintiff, as a witness on her own behalf, to testify to certain conversations between the deceased and the defendant, Morgan Petrie. After having testified, without objection, that she heard a conversation between Morgan and her father, in which she had no part, that she could see them in the barn where they were, and hear them talk, and she was a short distance from the barn, where they could see her if they looked that way, she was asked with reference to that conversation: "What conversation did

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you hear between Morgan and your father that morning?"

This was objected to by the defendant as inadmissible, under section 829 of the Code. The objection was overruled and exception taken. The witness answered: "They were talking about making a will; I heard Morgan ask him how he was going to make it; I heard father say that he wanted to give me my home there and support, and Morgan said: Give her some money; I didn't hear any more; they started for Oneida in a short time."

This evidence was admissible within the ruling in *Lobdell v. Lobdell* (86 N. Y. 327), approved in *Cary v. White* (59 N. Y. 336), *Badger v. Badger* (88 N. Y. 559), and recognized in *Holcomb v. Holcomb* (95 N. Y. 325), and *Lane v. Lane* (95 N. Y., 502), followed in *Stern v. Eisner* (51 Hun, 224; 21 N. Y. State Rep. 388.) If the testimony of the witness that she took no part in the conversation had been objected to, a more serious question would have arisen.

The evidence in fact objected to was not concerning a personal transaction or communication between the witness and the deceased. The fact that her name may have been mentioned, as long as she took no part in the matter and was not referred to as being present, does not make her a party.

The question only called for what occurred between Morgan and the deceased. The *Holcomb Case* is relied on by the defendant's counsel. The evidence there held inadmissible was materially different from the evidence here admitted.

The other conversations that the plaintiff was allowed to testify to presented substantially the same question. The questions called for what Morgan said to the deceased and were given by the witness after she had testified, without objection, that she had no personal connection with the transaction.

Several witnesses, after having detailed transactions with or concerning deceased, were allowed to state whether or

not the transactions as detailed by them respectively impressed them at the time as rational or irrational. We think that the rule laid down in *Clapp v. Fullerton* (34 N. Y. 190), was in substance followed.

One of the witnesses to the will, being upon the stand as a witness for the defendant and having testified as to what occurred when he witnessed the will and that the conversations and acts of the testator, detailed by him, impressed him at the time as perfectly rational, was asked the question, "was there anything in his manner or in his appearance different from what you had seen for the years past?" This was objected to generally by the plaintiff, and objection sustained and exception. This ruling is claimed to be erroneous within the rule that a subscribing witness can give his opinion generally as to the soundness of mind of the testator. *Clapp v. Fullerton*, 34 N. Y. 190.

The question strictly construed did not call for that, and, from what had previously occurred in the case, it may be inferred that it was not designed to do so. The witness had not described the manner or appearance of the testator at that time; he had stated the conversation and what was done. So that the witness was in effect asked to compare what he had not described with what he may have seen on previous occasions. In this view the ruling was not erroneous. If the party asking the question desired the benefit of the exceptional rule applicable to subscribing witnesses, the form of the question should have distinctly indicated it. Besides, in substance, the previous answer of the witness, that the acts and conversation of the testator impressed him at the time as perfectly rational, covered pretty much the whole ground.

We think there was no substantial error in the ruling.

The other objections presented on the part of the defendant we have examined, but find no cause for reversal.

The order should be affirmed, with costs.

MARTIN, J., concurs; HARDIN, P. J., concurs in result.

SIDNEY C. CROSS, Trustee, Respondent, v. NATIONAL FIRE
Ins. Co. Appellant.*Supreme Court, Fifth Department, General Term, June 22, 1889.*

1. *Deposition. Affidavit.*—An affidavit for an examination of a party before trial should be made by a person who knows the facts, or a reason assigned why it is not so made.
2. *Same. Bad faith.*—The refusal by an insurance company to receive the proofs of loss furnished by the insured, where all the information sought to be obtained by the examination can be found in such proofs, is an indication that the application was made for purposes of delay and not in good faith.
3. *Same. Record.*—Where the information sought by the examination can easily be ascertained by an inspection of the records of the county clerk's office, the order for the examination will be vacated.

Appeal from an order of the special term vacating an order made by a supreme court justice directing the plaintiff to appear before a referee and submit to an examination before answer, for the purpose of enabling the defendant to prepare its answer, as well as for trial.

Ellsworth, Potter & Storrs, for respondent.

I. N. Ames, for appellant.

MACOMBER, J.—The ground of this motion is stated, in part, to be, that the affidavit on which the original order for examination was granted, was insufficient under section 872 of the Code of Civil Procedure, as supplemented by our rules of practice.

The action is upon a policy of fire insurance. The affidavit, which is made by the attorney of record for the defendant, alleges that one, A. H. Bowen, was the agent and adjuster of the defendant, and had the management of the case in charge, and that he had told the affiant what he

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could learn about the case. The affidavit is entirely upon information and belief, and concludes as follows: "That deponent's knowledge, information and belief is derived from statements made to deponent by said Bowen as the adjuster of the defendant." This is mere hearsay evidence. Bowen should have made the affidavit, or some reason should have been assigned why such affidavit could not be forthcoming. Such an allegation is insufficient to support an order of this kind, and the order of the special term was right in vacating it.

Moreover, all the information, with perhaps one or two exceptions adverted to hereafter, which the defendant desired, could have been obtained in the proofs of loss which were furnished by the plaintiff to the defendant and its agents. The defendant, however, by its agent, not only in its correspondence refused to receive the proofs of loss as they were furnished, but gave notice in writing that it would not pay any attention in future to any further proofs, and did not care to have any supposed defects remedied, inasmuch as they should defend a recovery upon the policy. If these proofs of loss conformed to the requirements of the policy, they contained a description and valuation of the property destroyed, and the amount of other insurance thereon, if any, which are two of the principal facts which the affidavit states are desired to be ascertained before the answer can be framed. This circumstance, however, did not appear in the original papers, but was the subject-matter of affirmative affidavits used by the plaintiff upon which the special term has acted in part. It goes far to show that the application for the examination of the plaintiff was not made in good faith, but for purposes of delay, as is contended by counsel for the respondent.

The only remaining fact, of importance, which seems to have been desired by the defendant, relates to the nature and extent of the plaintiff's title to the premises. This, doubtless, could have been easily ascertained by an inspec-

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tion of the records of the county clerk's office of Niagara county, as is also shown by the affidavits used in behalf of the respondent. But, irrespective of the affirmative facts shown upon the motion to vacate the order, the order for examination could not stand under the defects already pointed out, and appearing in the affidavit upon which it was granted.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

BARKER, P. J., concurs.

DWIGHT, J. (dissenting).—The following is the full text of the statute (Code of Civil Procedure, sections 870, *et seq.*), upon which the proceeding in this action was based, so far as applicable to the particular case of the examination of the plaintiff, in a pending action, by the defendant, before answer.

“Section 870. The deposition of a party to an action pending in a court of record, * * * may be taken * * * at the instance of an adverse party, * * * at any time before trial, as prescribed in this article.

“Section 872. The person desiring to take a deposition as prescribed in this article may present to a judge of the court in which the action is pending, * * * an affidavit, setting forth, as follows :

“*First.* The names and residences of all the parties to the action, and whether or not they have appeared; and if either of them has appeared by an attorney, the name and residence, or office address of the attorney. * * *

“*Second.* The nature of the action, and the substance of the judgment demanded, and * * * the nature of the defense.

“*Fourth.* The name and residence of the person to be examined; and that the testimony of such person is material and necessary for the party making such application in the * * * defense of such action.

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"*Seventh.* Any other fact necessary to show that the case comes within section 870.

"Section 873. The judge to whom such an affidavit is presented must grant an order for the examination ; * * * the order may, in the discretion of the judge, designate and limit the matters as to which he (the party) shall be examined."

Portions of the statute omitted, show that it is only in case the person to be examined is not a party to the action that the affidavit is required to set forth that such person "is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial, or that any other special circumstances exist, which render it proper that he should be examined as prescribed in this article." Section 872, sub. 5.

So, too, it is only in case the action has not yet been commenced, that it is required to set forth "the circumstances which render it necessary for the protection of the applicant's rights, that the witness's testimony shall be perpetuated" (Id., sub. 6) ; or that the judge is permitted to dismiss the application for want of "reasonable ground to believe * * * that it is made in good faith." Section 873, last clause of the first sentence.

The statute is anomalous in the effect of some of its provisions, but it is positive in its terms, and (except in the single particular of limiting the scope of the examination) it leaves nothing to the judgment or discretion of the judge to whom the application is made.

I am unable to see wherein the affidavit presented to Mr. Justice VANN failed to meet the requirements of the statute. The objection made to it in the notice of motion to vacate the order, was that it did not state the defense, nor show that the examination was necessary. I find that the affidavit does "set forth" two grounds of defense, and states, in respect to each, "that the same is one of the defenses herein." I do not suppose that the court is at liberty, for

the purpose of condemning the affidavit, to assume that there are other defenses which are not set forth.

In respect to the second ground of objection specified, it will be seen that the statute, quoted above, nowhere requires that it should be made to appear that the examination is necessary for any purpose, nor for what purpose it is desired by the party making the application, whether for aid in framing an answer, or for use on the trial; it is only required that the affidavit shall set forth that the testimony of the person to be examined is material and necessary for the party making the application, in the defense of the action (subd. 4, *supra*); and that requirement is satisfied by the affidavit in this case.

The learned judge at special term based his decision upon facts *aliunde* the affidavit on which the order was made, which, in his judgment, demonstrated laches and bad faith on the part of the defendant in making the application. In this, I think his decision was erroneous. The order of Justice VANN being properly made upon the proofs before him, *i. e.*, upon an affidavit which sets forth all the facts required by the statute, it cannot be vacated, except upon proofs which successfully controvert some of the facts which are thus set forth, and are required to be set forth in the affidavit upon which the order was granted. If the defendant has gone beyond the requirements of the statute in the statements of his affidavit, it will not avail the plaintiff to controvert those statements, which are surplusage merely. So long as enough remains of the affidavit, notwithstanding the adverse proofs, to satisfy all the requirements of the statute, the order must stand.

But if the grounds assigned for the order at special term were sufficient, I should hardly concur with that court in holding these grounds established. It is difficult to see how laches, by delay to apply for the order, could be predicated of the defendant's proceeding, since, by the statute, the order might be applied for at any time before trial. The

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delay in service of an answer was shown to have been due to long and severe illness of the defendant's attorney, and the time to answer had been regularly extended. In respect to the *bona fides* of the application, we think it can hardly be said that the defendant had in its possession, in the proofs of loss, all the information it seeks to obtain by the examination. The defendant is not bound by the statements contained in the plaintiff's proofs of loss, and the court was not informed, nor was the defendant required to disclose, precisely what information it sought or expected to obtain by the means provided by the statute.

I am aware that there are decisions of the special and general terms of this court which seem to require more proofs upon an application of this kind than there are prescribed by the statute, of which an abstract has been given; but I think much of the discussion in those cases has arisen from an undue adherence to the practice which had grown up under the former statute. Code of Procedure, § 391. The provision of that statute was very general in its terms—merely giving the right to such an examination, and leaving the details of the proceeding to obtain it, to be prescribed by the general rules of practice and the decisions of the courts. Whereas the present Code—after the method peculiar to that enactment—prescribes the minutest details of practice, in this proceeding as in others, and leaves nothing to be supplied by the rules or decisions of the courts.

I think the unmistakable effect of the present statute is to give to either party to an action, who brings his case within the terms prescribed, the absolute right to examine any adverse party as a witness; and that the judge to whom the application for such examination, supported by the statutory affidavit, is presented, has no discretion to refuse the order, or to require proof of any fact beyond those categorically prescribed by the sections of the statute above quoted. The only discretion given to the judge is that of deciding

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whether the examination shall be entirely general, or limited to some particular branch or issue of the action.

As already intimated, I regard the statute as anomalous in many of its provisions, and capable of mischievous results in many cases; but the province of amending statutes belongs to the legislature, and not to the courts.

The affidavit in question seems to meet the requirements of the statute. It "sets forth"—in the entitling both of the affidavit and of the complaint, which is made a part of the affidavit—the names of the parties; the place of residence of the one, and the location of the principal business office of the other; that both have appeared by attorneys, and the names and places of residence of such attorneys; the nature of the action and of two proposed defenses; the name and residence of the person to be examined (the plaintiff), and that his testimony is material and necessary for the defendant in the defense of the action. These are, *seriatim*, the facts, and the only facts, which the statute requires shall be set forth in the affidavit; and section 873 provides: "The judge to whom such an affidavit is presented must grant an order for the examination if (as in this case) the action is pending."

It would seem that it was imperative upon Justice VANN to grant the order in this case, and that—the facts above enumerated not being controverted by the affidavits presented on the motion to vacate—the order vacating was improperly granted, and should be reversed.

**HENRY L. FISH, et al., Respondents, v. ALICE M. COLVIN,
Appellant.**

Supreme Court, Fifth Department, General Term, June 22, 1889.

Appeal.—Where the only evidence, given on the trial of the action, to support the plaintiff's claim of employment to sell defendant's property, was obtained by an erroneous ruling upon objection, it is inadequate to sustain the verdict.

Appeal from the judgment of the county court entered on a verdict, and from an order denying defendant's motion for a new trial in an action first tried in a justices' court.

J. D. Decker, for appellant.

P. Chamberlain, for respondents.

DWIGHT, J.—The action was for broker's commissions in the exchange of the defendant's house and lot in Clarkson for city property in Rochester. The real question in the case was whether the plaintiffs were employed by the defendant to sell or exchange her property, and upon that question the verdict was against the clear weight of the evidence. The defendant, her husband, and his son, a lad of eleven years of age, testify positively that nothing was said to or by the plaintiff, Halsey (and Fish had nothing to do with the transaction) about a sale or exchange of the defendant's property; that the application to him was solely to rent a house from him, as agent for the owner. Moreover, the plaintiff, Halsey, in his own testimony fails to mention any language employed by either party to the transaction which could be construed into evidence of an employment of him, or of his firm, to sell or exchange the defendant's property, until induced by a distinctly leading question of his counsel. That question was objected to as leading and reiterated notwithstanding the objection, which

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was finally overruled and an exception taken. He had told his story and made no case of employment by the defendant for any purpose.

Then the question was put to him by his counsel: "Did she say anything to you about wanting you to assist her to trade her house?" The question was objected to as leading.

Q. What did she say upon that subject, if anything? The objection was repeated.

By the court—Was there anything further said at that interview? A. Yes, sir; she said she would like to trade it. Still there was no suggestion of an employment of the plaintiff to make the trade.

Q. About having you trade it for her, what did she say to you on that subject? The objection was renewed, but was overruled and an exception was taken. A. They said they wanted us to sell or trade the property. And this is the only evidence to support the plaintiff's allegation of their employment to make the transaction for which the commission is charged.

We regard it as inadequate to support the verdict and as obtained only by an erroneous ruling upon the objection of the defendant.

The judgment should be reversed and a new trial granted.

Judgment and order reversed, and a new trial granted, with costs to abide the event.

All concur.

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CHRISTOPHER HALPIN, Respondent, v. HOTCHKISS S.
FINCH, Appellant.

Supreme Court, Fifth Department, General Term, June 22, 1889.

Appeal.—The judgment on the verdict will be affirmed by the general term, where the evidence is conflicting, and a motion for a new trial has been denied.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

Calvin J. Huson, for respondent.

John H. Young, for appellant.

MACOMBER, J.—This action was brought to recover for personal services of the plaintiff under an alleged employment of him by the defendant, to take the care of and to run a grist mill.

No question is presented by this record, but that the plaintiff actually rendered the services alleged, and that they were reasonably worth the amount for which the verdict was rendered, nor is it seriously disputed that the defendant himself, though not having the legal title to the premises, was the person who secured the plaintiff's services by a contract of some sort. It is claimed in his behalf, and such is his testimony, corroborated in part, at least, by the testimony of one French, that the plaintiff was to obtain his compensation solely out of the avails of the milling business.

At one time he did conduct the same mill under a like agreement with Mr. French, who was the owner of the premises at that time. Under the plaintiff's evidence, however, supported as it is to some extent by the letters

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written by the defendant himself, and by circumstances, the case presented a question solely for the consideration of the jury. The case was properly laid before them by the learned judge at the circuit, and no exception appears in behalf of the defendant, either to the charge or to any ruling, which requires any consideration from us. There is not that clear preponderance of evidence in behalf of either side which would justify us in interfering with the verdict, particularly as the judge at the circuit, with the benefit and advantage of having the several witnesses before him, has, upon a motion, denied such relief to the appellant.

The judgment should be affirmed, with costs.

All concur.

**ALICE KNIGHT, Respondent, v. THE SUPREME COURT OF
THE ORDER OF CHOSEN FRIENDS, Appellant.**

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Benefit societies. Defense.*—A member of a mutual benefit associations upon whom a notice of assessment is served, has a right to presume that he has the usual time to pay the assessment; and his failure to pay within a shorter period, is no defense in an action, after his decease, on his certificate.
2. *Same.*—No defense for non-payment is available, where there remain, in the association's hands, funds of deceased sufficient to pay the assessment.

Appeal from an order denying a motion for a new trial, after a verdict directed by the court in favor of the plaintiff.

Geo. M. Osgoodby, for respondent.

John E. Pound, for appellant.

MACOMBER, J.—The defendant is a mutual benefit insur-

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ance society, incorporated under the laws of the state of Indiana, having subordinate councils in this state. Its main object is to secure to those of its members who comply with the constitution and by-laws, or to their designated beneficiaries, a benefit not exceeding the sum of \$3,000. The losses are paid from what is known as a relief fund, which is created and maintained by assessments, levied upon the members by the supreme council, as often as required by reason of the death of the insured.

The deceased, John Knight, became a member of the Erie Council, No. 23; on the 28th day of July, 1884, when he received a beneficiary certificate for \$3,000, which, with his consent, was made payable to his wife, the plaintiff, in case of his death. He died on the 3d day of February, 1887, after being a member of the order for two years and a half.

The controversy between these parties arises over the omission of the deceased to pay an assessment which was levied on the 1st day of January, 1887, and which was made payable in the usual course of the business of the order within thirty days from its date, which would be January 31, 1887. It is admitted that this sum was not paid by the deceased. Article 8, section 1, of the constitution of this subordinate order, provides for the service of a notice of assessment as follows :

“Section 1. The secretary shall make out and deliver to each beneficiary member in good standing, either in person or to some person authorized by the member to receive the notice, or upon depositing the same in the post-office, directed to the member's last known address, a written or printed notice or assessment on account of the relief fund issued by the authority of the supreme council, and such a notice shall be deemed to be held a legal notice of such assessment. The secretary, in making these notices, is required to use the official notice blank furnished by the supreme council, but the use of any other form or blank shall not invalidate

the notice to the member, but only render the secretary subject to discipline."

By article 8, section 5: "When an assessment is made, it shall be the duty of the secretary to at once notify every member liable to the assessment * * * each member shall pay the amount due to the secretary within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days, shall forfeit all the rights and claims to benefits under the relief fund law, and shall be reported suspended from beneficiary membership by the secretary in his report to the supreme treasurer * * * and shall stand so suspended until all arrearages and fines shall have been paid to the secretary, and all other laws governing reinstatements have been fully complied with."

The import of this section, although not expressly so declared, is that the member shall have thirty days' notice for the payment of this assessment, or, at least, thirty days, less reasonable time allowed for the mailing or personally serving such notices.

It was the duty of the secretary to notify Mr. Knight of the assessment immediately after the same was made. No notice was given, either to him or any other person in his behalf, until the 13th day of January, and then only in the following manner: On that day, namely, the 13th day of January, 1887, the little daughter of the deceased went to the secretary's office to pay a previous assessment, and in the envelope containing the receipt and the change was the notice which the defendant now relies upon. There is evidence by the plaintiff to the effect that she told her husband, some time afterwards, that such a notice had been brought home by the little girl, whereupon the deceased remarked that he would attend to it on a certain day, after his return from his duties at a distance upon the railroad.

The service of this notice is not the service contemplated by these by-laws. It was not done "at once" upon the making of the assessment, nor was it done within a reason-

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able time thereafter, if payment was to be insisted upon on the 31st day of the month. The plaintiff's intestate was killed upon the railway twenty-one days after the little girl brought home this notice.

There is no evidence that the little girl had authority to receive this notice so as to bind the deceased, and he could be charged with such service only through the existence of the fact that the service had in fact been brought home to him by information furnished by his wife. The wife's evidence was sufficient to show that a notice had that day been served, but it is not sufficient to show that he had any reason to believe he was required to pay sooner than thirty days from that time. Under the course pursued by the defendant in its business and under its rules and regulations, the deceased had a right to presume that the usual time was allowed him in which to meet this assessment. There is, therefore, no defence available to the defendant by reason of the failure of the deceased to pay the assessment of January first. See *Baxter v. The Brooklyn Life Insurance Co.*, 44 Hun, 184; 8 N. Y. State Rep. 246.

Aside from this consideration, however, there is a further defense, and that is, that the defendant had already in its hands moneys illegally exacted from the deceased which it ought to have applied to the extinguishment of the assessment of January 1, 1887. Mr. Knight became a member of the order on the 28th day of July, 1884. He was not liable for any assessment for any loss prior thereto. Yet it is shown in the case, that he was included in and paid an assessment of July 22, 1884, under circumstances which would show that it was not a voluntary payment, beyond the fact that he had reason to suppose that the demand made upon him was legal and binding. So long as there remained in the treasury of the defendant sufficient funds of the deceased with which to pay the assessment in question, no defense of forfeiture for non-payment was avail-

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able to it. For this reason, also, the judgment should be affirmed.

There is also evidence of actual waiver of prompt payment of the amount required by the assessment of January 1, 1887. After the decease of Mr. Knight, he was, by resolution of the defendant, recognized as being a member in full standing at the time of his death. There are other items of evidence, though slight, which would render it necessary to submit the question of a waiver of a forfeiture to the consideration of the jury, had the course pursued at the trial required the judge to do so. But the defendant expressly waived any right to go to the jury, and it cannot now complain of the result upon the facts to which the learned trial judge arrived, so long as there was sufficient evidence to support it.

The order should be affirmed, with costs.

All concur.

In the Matter of the Judicial Settlement of the Accounts of JANE A. MAY, Executress, etc., of VASHTI ACKER, Deceased.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Surrogate. Power.*—The surrogate, after the transference of the case to the general term by an appeal, has no power to open the decree, and send the issues back to the referee to take further testimony, or for the settlement of the decree.
2. *Appeal. Stipulation.*—The general term, where the respondent tenders a stipulation to resubmit the matter to the surrogate, if the appellant will withdraw his appeal, which the appellant declined will not, under its discretionary power, reverse the order, or grant the motion as an original application.

Appeal from an order of the surrogate, denying the application to open a decree settling the accounts, and to send the issues back to the referee to take further testimony.

Opinion PER CURIAM.

H. H. Woodward, for the executrix, appellant.

Ivan Powers, for the contestants of the accounts, and guardian *ad litem*, for certain infants, respondents.

PER CURIAM.—The report of the referee, to whom had been referred the settlement of the accounts of the executrix, was confirmed by the surrogate, except in regard to the fourth conclusion of law, relating to the application of the statute of limitations to the interest of certain persons not necessarily now to be considered; and a decree was thereupon entered accordingly. From this decree the executrix has appeal to this court, but the merits of such appeal are not before us. After the perfecting of such appeal, the motion was made before the surrogate, as above stated. The surrogate denied the motion, among other grounds, for the reason that the case having been taken out of his court by appeal, he had no power to entertain such a motion. In this decision we concur with him. After the transference of the case to this court, the surrogate had no power to proceed upon any matter contained in the record so transferred. Notwithstanding such appeal, however, the counsel for the respondents tendered a stipulation, after the surrogate had indicated his want of power to proceed upon the motion, to the effect that if the appellant would withdraw the appeal, the case might be resubmitted to the surrogate with power to make any changes which he saw fit therein. This was declined by the appellant.

Under the sixth subdivision of section 2481 of the Code of Civil Procedure, "upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the general term of the supreme court has the same power as the surrogate; and his determination must be reviewed as if an original application was made to that term." We do not, under the discretionary power so given us, feel disposed to grant the application either to reverse the surrogate's order, or to grant the motion as an original

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application to us, inasmuch as the appellant voluntarily refused, under the stipulation already mentioned, to permit the surrogate to pass upon the questions raised, reserving to ourselves, for further consideration, any question which may arise upon the appeal from the decree entered upon the report of the referee.

The order appealed from should be affirmed, with ten dollars costs and disbursements, and the application denied.

All concur.

WILLIAM D. TABOR, Appellant, v. THE BOARD OF SUPERVISORS OF ERIE COUNTY, Respondent.

Supreme Court, Fifth Department, General Term, June 22, 1889.

Payment.—Where, in an action to recover state bounty money, for substitutes furnished, under the call of December, 1864, received by defendant for the use of plaintiff's assignors, in which the defense was payment, there was nothing in the evidence to indicate how many of the substitutes furnished by plaintiff's assignors, were procured, or how many of them were of the number to whom nothing was paid, or to whom a larger or smaller sum was paid, out of the county funds, the defense of payment was not established.

Appeal from an order denying a motion to set aside a verdict, and for a new trial.

C. H. Keep and *N. Morey*, for appellant.

J. M. Humphrey, for respondents.

DWIGHT, J.—The action was to recover state bounty money, alleged to have been received by the defendant for the use of the plaintiff's assignors—202 in number. The plaintiff alleges that each of his assignors furnished a substitute in the military service of the United States, who

was credited on the quota of the county of Erie, under the call of 19th of December, 1864, for which he was entitled to a bounty of \$400, under the provisions of chapter 29 of the Laws of 1865, and that such bounty has been paid by the state to the defendant for the use of such assignors.

For all the purposes of this review we deem ourselves concluded, as to all the principal questions in the case, by the decisions of this court on two former appeals in this action; in which decisions, it may be remarked, neither of the justices, at present composing the court, took part.

Then on the first appeal, decided in 1881, it was held—reversing an order of the special term which denied the plaintiff's motion to set aside a nonsuit and for a new trial—that, upon the case then made, the plaintiff's assignors were within the provisions of the act of 1865 (*supra*); that they were entitled to a bounty under that act; that money, representing the bounties to which they were entitled, had been received by the defendant; that an action, as for money had and received, might be maintained by them, or the assignee, against the defendant; in short, that the plaintiff had made out his cause of action *prima facie*, and that the nonsuit was improperly granted.

On the second trial the case was submitted to the jury substantially upon the issue of payment raised by an averment of the answer to the effect that the county had paid a bounty of \$600 to every substitute, mustered into the service, and credited to the quota of Erie county, in the years 1864 and 1865, which payment was made with the consent of the several persons furnishing such substitutes. A verdict was taken for the defendant.

On the plaintiff's second appeal, which was from an order of special term denying his motion for a new trial, this court in 1884 held, that the verdict was without evidence to sustain it, and supported its decision, in an opinion by its presiding justice, by a careful analysis of the questions presented by the plea of payment, and a review of the evidence bearing

upon them. The conclusion was reached that there was no evidence, whatever, that the county had paid any bounty for the substitutes furnished by the plaintiff's assignors, either to the principals entitled thereto under the statute, or to the substitutes on account of their principals; and that the court erred in refusing the plaintiff's request to direct a verdict in his favor.

On the third trial, which gave occasion for the present review, the case was again submitted to the jury upon the sole issue of payment, all other questions in the case being regarded as disposed of by the previous decisions of the general term.

On this trial the defendant added to the former evidence, relating to the question submitted, only the testimony of the witness Webster. He was one of the committee engaged in 1864 in filling the quota of the county, and, for that purpose, procuring recruits and paying bounties for enlistments. He did not attempt to testify to any individual payments, made either to principals or substitutes, nor that payment was made, in any case, to or with the consent of persons furnishing substitutes, but only, in general terms, that county money was paid to all persons who were enlisted, whether volunteers or as substitutes, during the time covered by the complaint.

His testimony was: "The county paid just the same for a substitute as they did for any other volunteer; if a man wanted a substitute and brought his money there, we used the money for him and his benefit, and for the benefit of the county, and the county got the benefit of the substitute just the same as the volunteer; he went to our credit." Later, in his examination, he was understood by the court to testify that substitutes got the county bounty and what the principals paid, besides. The statement is not credible, and it is doubtful if the witness intended to be so understood. Certainly, it was shown not to be true by the report of the committee, of which Mr. Webster was a member, made to

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the board of supervisors, and signed by him. It contained a summary of the account kept by the committee of their receipts and disbursements in the business of enlisting men, to which account the witness frequently referred in his testimony, as being entirely full and accurate. That report shows that from the 24th day of June to the 24th day of October, 1864, the date of the report, the committee had enlisted 242 substitutes; that of these, 150 were procured (for persons desiring to furnish them) by the committee, "at an average cost, per substitute (over and above the amount paid by principals), of about \$158." And that the remaining ninety-two, who were procured by agents and others were paid nothing from the county funds. There is nothing in the evidence to indicate how many of the substitutes furnished by the claimants in this action were procured, or how many of them were of the number to whom nothing was paid, or of those to whom a larger or smaller sum was paid, out of the county funds.

This is substantially all the evidence on the subject of payment. It is unnecessary to discuss the question whether it makes a case for submission to the jury on the issue made by the answer, of payment, of the full sum of the bounty provided by law, to, or on account of, the persons furnishing the two hundred and two substitutes named in the complaint. It must be said that the evidence scarcely goes further than to show that something may have been paid out of the county money, to some of the substitutes in question; and is totally ineffective to establish the defense of payment, to any one of the two hundred separate causes of action set out in the complaint.

It seems surprising that evidence was not produced by the defendant upon this question, or its non-production accounted for. It must be supposed that the committee which disbursed the large amount of money, shown by their report to the board of supervisors, kept books of account, showing date and amount of payments and the

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persons to whom they were made. It is not probable that they made such payments without taking receipts therefor. But neither account book nor receipt was produced, nor was any reason given for their non-production.

It is unnecessary to consider any of the questions submitted to the jury for special findings. It is sufficient to say that none of them bear any relation to the single issue upon which the case was submitted for a general verdict. Probably that was sufficient reason why they should not have been propounded to the jury. But the matter is unimportant in view of the disposition to be made of the general verdict. That verdict, having been found without evidence to support it, must be set aside and a new trial granted.

Order reversed, and a new trial granted.

MACOMBER, J., concurs ; BARKER, P. J., not voting.

JAMES S. MCKAY, *et al.*, as Superintendents of the Poor of Steuben County, Respondents, *v.* WILLIAM WELSH, JR., as Overseer of the Poor of North Dansville in the County of Livingston, Appellant.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Poor and poor laws. Notice. Liability.*—A notice, given by the superintendent of the poor to the overseer which simply states that the pauper was supported at the expense of his county, without an averment of an unlawful or improper removal, is insufficient, under section 59, title, 1 chap. 20, part 1, of the Revised Statutes, as amended by chap. 546, Laws of 1885, to require the overseer to deny by counter notice, does not preclude the town, in the absence of such denial, from contesting the claim, and does not comply with the requirements of the statute so as to create any liability against the defendant.

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Appeal from a judgment entered upon the report of a referee.

Geo. T. Spencer, for respondents.

Geo. J. Bissell, for appellant.

MACOMBER, J.—The plaintiffs, who are the superintendents of the poor of the county of Steuben, bring this action to recover of the overseer of the poor of the town of North Dansville, in Livingston county, certain sums of money which had been expended by them in behalf of one Martin Roff, who was alleged to be a poor and indigent person, sent or removed, or who came of his own accord, from the town of North Dansville to the town of Hornellsville.

For a number of years prior to 1886, this Martin Roff was domiciled with his family in the town of North Dansville. In the month of November or December, 1886, as the referee finds, he “went from his own accord, from his residence, in North Dansville, to the town of Hornellsville, and engaged in services as a barber, where he continued until the 25th day of January, 1887, when he was taken sick, and being without means, and needing care and relief, was taken charge of by the plaintiffs, as superintendents of the poor of Steuben county, who thereupon furnished him relief and support.”

Section 59 of the Revised Statutes (title 1, chap. 20, part 1), as amended by chapter 546 of the Laws of 1885, is as follows:

“Any pauper so removed, brought or enticed, or who shall of his own accord come or stray from one city, town or county, into any other city, town or county, not legally chargeable with his support, shall be maintained by the county superintendents of the county where he may be. They may give notice to either of the overseers of the poor of the town from which he was brought, or enticed, or came, if such town be liable for his support; and if there be no

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town in the county from which he was brought, or enticed, or came, liable for his support, then to either of the county superintendents of the poor of such county, informing them of such improper removal, and requiring them forthwith to take charge of such pauper."

The evidence shows that Martin Roff, while living in Dansville, was not a pauper, but on the contrary was a freeholder, his wife having a house and lot there, for the purchase of which he had materially contributed. He was not a tramp. He seems to have gone from North Dansville to Hornellsville for the purpose of bettering his condition or earning more wages at his trade. At Hornellsville he fell ill, and being without funds, became a charge upon the authorities there. He was not, however, a pauper, within the meaning of the term used in this statute. Nor has the referee found him to be a pauper. He has simply found that being domiciled and residing at North Dansville, he went of his own accord from his residence, etc., and engaged in services as a barber. This finding is as broad as the evidence could warrant.

Hence the conclusion reached by the referee is founded, not upon the fact that Roff was actually a pauper when he left North Dansville, but rather upon the fact that the overseer of the poor of that town failed to notify the county superintendents, from whom the notice had been received, that he denied the allegation of such improper removal, or that his town was liable for the support of such pauper. In pursuance of section 60 of chapter 546 of the Laws of 1885, the overseers of the poor are required, when notified, within thirty days to take and remove the pauper from the county where he has gone to their own town and support him, and pay the expenses of the notice and the expense of the support of such pauper,, "or they shall within the said time, by a written instrument under their hands, notify the county superintendents from whom such notice was received, or either of them, that they deny the allegation of such im-

proper enticing or removal, or that their town is liable for the support of such pauper."

It is conceded that the overseer of the poor of North Dansville did neither of these alternative acts. Section 61 makes the town liability absolute, and precludes it from contesting the allegations of the notice, unless the facts and the liability are denied by the counter-notice. Liability immediately attached in behalf of the superintendents giving succor to this supposed pauper against the municipality from which he came, and an action might be maintained therefor, together with the expense of notifying the overseer of the town, provided the notice which the plaintiffs served was sufficient.

That notice is as follows :

COUNTY OF STEUBEN, ss. :

"To the overseer of the poor of the town of North Dansville, Livingston county :

"You are hereby notified that Martin Roff, who gained a settlement in your town, to which he belongs, is in the town of Hornellsville, in said county of Steuben, and is supported at the expense of Steuben county, for which the undersigned is county superintendent of the poor. You are therefore required to provide for the relief and support of the said pauper.

"Given under our hands at Hornellsville this 28th day of January, 1887.

"JAMES S. MCKAY,
"CHAS G. HUTCHINSON,
"GEORGE P. LORD."

The first part of this notice is so drawn as to relate to controversies between towns of the same county, rather than to matters arising under the statute in question. But giving to it the broadest application, it does not come up to the requirements of the statute. It does not aver that Roff was

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a pauper while in North Dansville. It does not aver that his voluntary change of habitation was "improper." For aught that appears in the notice, Roff's removal was legal and proper. Its language is entirely consistent with the idea he was the welcome guest of Steuben county. A notification that he was supported at the expense of that county, unaccompanied with an averment of an unlawful or "improper removal," was not sufficient to call upon the overseer of the poor of North Dansville to deny anything contained therein.

We are not unaware that the amendment of the Revised Statute made by the act of 1885 (chap. 546, *supra*), which includes voluntary removals of poor persons from one county to another, has been repealed by chapter 486 of the Laws of 1888, thus restoring the provisions of the Revised Statutes as they existed before the passage of the act of 1885, but such repeal can have no bearing upon the questions presented in the case.

The judgment should be reversed, and a new trial granted before another referee, with costs to the appellant to abide the event.

All concur.

ALBERT H. PICKARD, President, etc., Appellant, v. JOHN
SIMSON, Respondent.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Account stated.*—A statement of only one side of an account, and that the side to the credit of the defendant, without any ascertainment of, or allusion to, any balance found due or agreed upon between the parties, falls short of establishing a cause of action, on an account stated against the defendant.
2. *Appeal. Ruling final.*—The ruling of the court, upon an examination of the pleadings, at the beginning of the trial, as to the nature of the issues involved in the action, without any exception thereto taken by either party, must be regarded as conclusive for all the purposes of the trial and of the review upon appeal.
3. *Same. Relief.*—Where no amendment was asked for in the court below, nor any motion for a new trial, based upon the ground of surprise, made, relief from a judgment obtained through inadvertence of the attorney in drafting the pleading, or of counsel on the trial, cannot be granted.

Appeal from a judgment entered on a verdict directed by the court, and from an order denying a motion for a new trial on a case and exceptions.

S. E. Graves, for appellant.

George Wing, for respondent.

DWIGHT, J.—At the opening of the trial of this action at the circuit, as we read from the record before us, “the question came up as to whether the action, as stated in the complaint, was for an accounting, or upon an account stated. The court held upon an examination of the pleadings, that the action was upon an account stated, and the trial of the action proceeded upon that construction of the pleadings.” No exception was taken by either party to this ruling of the court, and it must be regarded as conclusive for all the pur-

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poses of the trial and of this review. But we have also examined the pleadings, and, if the question were an open one, should have no hesitation in reaching the same conclusion as to the nature of the action as that embodied in the ruling by the court below.

At the close of the evidence the court directed a verdict for the defendant, and the only question now presented is whether a case was made for submission to the jury, upon a cause of action on an account stated between the parties.

The plaintiff sues as president of a joint stock association organized for the manufacture of carriage axles, of which the defendant was president and acting financial manager (so far as the association had any financial management), from its organization, in 1878, to January, 1881. Soon after his retirement from the presidency a committee consisting of the plaintiff and one Lamphire, the nominal treasurer of the association, was appointed to examine the affairs of the company and "to settle with the defendant." It seems that the company had no money to begin with and never made any money. The means for carrying on its business were derived from the avails of the discount of notes made by some members of the company and endorsed by a man by the name of Driggs for a consideration. When these notes fell due they were either renewed, or, if the company had not money enough to pay the interest and the commission to the endorser, some of them were paid by assessments upon the members of the company.

The evidence in support of the plaintiff's cause of action consisted of the testimony of the plaintiff and Lamphire. The plaintiff testified that while the defendant was acting as the financial agent of the company "there was paid to him by the shareholders about the sum of \$21,802.38. "This he swears to in gross without any specification of dates or amounts, nor any statement of the means by which he arrives at the gross sum. He testifies that the committee called upon the defendant "to confer with him relative

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to the amount of money received and paid out by him for the company * * * "We went through his books; he gave us the items he had paid out for the company, and I set them down on a piece of paper." He testifies that he footed up those items and they amounted to \$13,452.87; and he adds: "he (the defendant) has never, that I know of, paid the difference between that \$13,452.87 and the sum of \$21,802.38, that I have named."

This is all that the first witness testifies to on his direct examination in support of the allegation of an account stated. He does not say that the amount of \$21,802.38 was ascertained or verified from the books as the amount received by the defendant, nor that that or any other sum received was agreed upon or even mentioned in the interview, nor that any balance was mentioned or alluded to, but only that the defendant read off from his books "the items he had paid out," and the witness set them down on a piece of paper.

Counsel for the defendant came nearer proving an account stated, on the cross-examination of the plaintiff, than his own counsel had done. He seems to have supposed that the witness had testified to a balance ascertained or mentioned at the "settlement," for he asked:

Q. At that settlement, all that you say that was done, then, was a certain amount found remaining in defendant's hands, as you claim? A. Yes.

Q. Did he say that was right? A. Well, he did not object to it.

Q. What did he say? A. Well, I don't remember what he did say.

Q. You don't know what he did say? A. No, sir.

The testimony of Lamphire was no more to the point than that of the plaintiff. He corroborates the plaintiff in respect to the appointment of the committee and the meeting with the defendant, and further testifies as follows: "At that meeting, defendant produced books and vouchers;

according to the books and papers he produced, and according to his statement, he had paid out \$13,452; I think that was about the amount showed up; he did not, at that time, show that he had paid anything more than that; no larger sum than that has been accounted for by him or paid over to the company."

This is all the testimony in the case in support of the issue tendered by the complaint. It is scarcely necessary to remark that it falls short of establishing a cause of action against the defendant, on an account stated, because it shows a statement of only one side of the account, and that the side to the credit of the defendant.

There were some exceptions taken by the plaintiff to rulings of the court in the admission of evidence, but none of the evidence objected to had any bearing upon the issue tried, and hence was not to the prejudice of the plaintiff.

The suggestion that the plaintiff should be relieved from this judgment because he had been subjected to it by the inadvertence of his attorney in drafting the complaint, or of his counsel on the trial of the cause, cannot be entertained. Leave to amend his pleading was not asked for below, nor was the motion for a new trial based upon the ground of surprise.

The record discloses no error which vitiates the judgment. The judgment and order should be affirmed.

All concur.

HIRAM W. SIBLEY, as Survivor, etc., v. CHAUNCEY G. STARK-
WEATHER.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Partnership. Guaranty.*—A partner who gives to his firm an instrument in writing, indemnifying them against all loss or damage by reason of certain advances made by them on his individual liabilities, and afterwards transfers his interest in the firm, though without reservation or recourse, is not thereby released from his contract of guaranty.
2. *Same. Statute of limitations.*—A judgment against the firm on its undertaking, determines its liability, a cause of action then accrues in favor of the firm on the contract of indemnity, and the statute of limitations begins to run in favor of the partner from the date of the said judgment, though such judgment has never been paid.

Motion by the plaintiff for a new trial on a case and exceptions ordered to be heard in the first instance at general term, judgment in the meantime being suspended.

J. C. Smith, for motion.

W. F. Cogswell, opposed.

DWIGHT, J.—The action was on two instruments in writing, by which the defendant agreed to guarantee and indemnify the firm of Hiram Sibley & Co., of which the plaintiff is survivor and of which the defendant was then a member, against loss by reason of payments made by them on certain liabilities of one Briggs. The circumstances of the transaction involved, so far as they are disclosed by a record somewhat scantily made up, were briefly as follows: The copartnership of Hiram Sibley & Co., consisting of Hiram Sibley, Isaac S. Averill and the defendant, Starkweather, was formed on the 12th day of September, 1878, and on the same day purchased from Charles W. Briggs his seed business, which had been carried on by him at

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Rochester under the name of Briggs & Bro., together with the stock of seeds and other personal effects belonging to the business. It was provided by the bill of sale that the first moneys to be paid on the purchase price might be applied by the purchasers to pay off the claims of indorsers and lenders holding liens on the seeds and effects purchased, and other creditors of Briggs secured by collaterals. The defendant had been an indorser for Briggs, and notes of the latter were then outstanding bearing his indorsement, and also a note of \$2,500 made by John T. Briggs and indorsed by "Briggs & Bro." and the defendant. On the fourteenth day of September, two days after the sale of his business, Briggs made a general assignment, "for the benefit of creditors," to Nathan P. Pond. On the third day of October, Hiram Sibley & Co. advanced money to pay notes indorsed by the defendant, including the \$2,500 note of John T. Briggs, upon the defendant's executing the first of the two instruments above mentioned, by which he guaranteed the firm against all loss or damage by reason of such advance.

On the fourteenth of September, the day of the date of his general assignment, but before the execution of that paper, Briggs made a bond and mortgage on a farm in the town of Gates for \$5,000, running to Starkweather, which the latter on the 18th day of January, 1879, assigned to the firm. On the last-mentioned day Starkweather executed to the firm the second of the instruments upon which this action is based. It repeats the guaranty to the firm against loss by reason of advances to pay off liens on the property bought by them and "takes all risks in every and any defense or objection that may be made against such payment or the validity of the debts to me (Starkweather), secured by such mortgages as were pledged for the payment of any claim in any form against the said Briggs." It seems that the lien of this mortgage was afterwards cut off by the foreclosure of a prior lien.

It is difficult to see how this mortgage, given after the

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bill of sale, could have been regarded as within the provisions of that instrument or how it was covered by the last-mentioned agreement of Starkweather. The latter gives, in his evidence, the only intelligible account which the case contains, of the inception of the mortgage. He says it was given by Briggs to him, for the firm, under an arrangement by the partner Averill, as security for a loan to Briggs which the latter required as a condition of surrendering possession of the business and effects embraced in the purchase; that Averill raised the money for the loan on a joint note of himself and Starkweather, and that the firm afterwards paid that note and he assigned the mortgage to them. If this is the true history of the \$5,000 mortgage it was not within the agreement of indemnity any more than it was within the provisions of the bill of sale. But it is unnecessary to discuss the questions peculiar to the mortgage, since the case of the \$2,500 note furnishes a sufficient test of the correctness of the disposition which was made of the action at the circuit.

In April, 1879, Pond, the assignee of Briggs, brought an action against the firm to recover the amount unpaid on the purchase, and the defendants answered, setting up among other things the advances made on the \$2,500 note and the \$5,000 mortgage, as payment, under the terms of the bill of sale, of so much of the purchase-price to be paid by them. The pleadings in that action are not in this record, but the answer does not seem to have pleaded the advances in question as an offset to the plaintiff's demand. The result was a disallowance of these advances as not within the provisions of the bill of sale; and judgment accordingly was recovered against Hiram Sibley & Co. on the eighth day of October, 1881. Hence this action to recover the sum of \$7,500, loss and damage sustained by them by reason of the advances in question.

In May, 1879, Averill transferred his interest in the firm to Hiram Sibley. In June, 1881, Starkweather, with the

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consent of Hiram Sibley, sold out his interest to Stuart, Barton & Mills, by an instrument in writing which contained the following terms: "The party of the first part doth hereby assign, transfer, sell and convey to the party of the second party all his right, title and interest in the property and assets of the firm of Hiram Sibley & Co. * * * without any reserve or recourse whatever. * * *

This agreement and transfer is made subject to the payment by the parties of the second part, and the undertaking by them to pay all firm debts and liabilities, for which the party of the first part is, or may be, liable as one of the members of the said firm." At the foot of this assignment was the following consent, signed by Hiram Sibley: "The undersigned owner of the remaining two-thirds of the property above-mentioned hereby consents that such assignment may be made, and admits into such copartnership the above-named parties of the second part." The plaintiffs offered to prove by Hiram Sibley that this consent was given upon the express condition that the liability of the defendant, upon his contracts of indemnity, should not be discharged.

In April, 1883, Barton and Mills sold their interest in the firm to Hiram W. Sibley, and in January of the same year Stuart sold his interest to the two Sibleys. This action was commenced by them in August, 1886, and, Hiram Sibley having died since the trial, it now proceeds in the name of Hiram W. Sibley, the sole survivor of the firm.

Upon the facts thus stated, we think the plaintiff made a case for recovery upon the guaranty against loss in the payment by the firm of the \$2,500 note, and the conclusion turns wholly upon the question whether the defendant was released from his contract of guaranty by the transfer of his interest in the copartnership to Stuart, Barton & Mills. We think he was not. From the moment of his execution of the instrument of indemnity which embraced the note in question, that instrument became a part of the assets of the

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copartnership, in which, it is true, he had an interest, subject to an accounting, as a member of the firm, but upon which he was solely and individually liable. That interest he transferred, with his interest in all the other assets of the copartnership, to Stuart, Barton & Mills, by his assignment without reserve; and upon no principle, as we conceive, was his individual liability to the firm extinguished by the transfer. It is said that the transfer was without recourse as well as without reserve. True, but the recourse which was barred by the contract was recourse by the firm against him as a member of the firm. He was no longer subject to, nor could he thereafter maintain, an action for an accounting to ascertain his interest in or his liability to the firm as a partner, because by his transfer he had parted with that interest (with the consent of his copartner) and been relieved from that liability.

But his liability on the contract of indemnity stood upon another footing. That was a contract upon which he was solely and individually liable, the consideration therefor being for his own individual benefit. It belonged to the copartnership as much as if it had been his individual promissory note contributed by him as his share of the capital; and his interest in it passed to his transferees as fully and unreservedly as his interest in all the other assets of the firm. A case less complicated in its details, but which we conceive is parallel in the principles involved, may be supposed. A and B form a copartnership to deal in commercial paper. B sells to the firm the promissory note of a third party, with his own guaranty of payment. Afterwards, with the consent of A, he transfers his interest in the copartnership to C, "without reserve and without recourse." The maker of the note proves to be worthless, and the firm brings the action on B's guaranty. We apprehend there could be no question of its right to recover; B would have no right to an accounting, because he had transferred his entire interest in the partnership to C. He could

not defend under the terms "without recourse," because he contracted with C only in respect to his partnership interest and liability, and the liability sought to be enforced is individual.

The views suggested are elementary in their character, and, if correct, they obviate much of the discussion had on the argument of the case.

Among the grounds stated of the motion for a nonsuit, aside from those already considered, it was said that the cause of action, if any, relating to the \$2,500 note, accrued immediately upon the execution of the first instrument of indemnity, and was therefore barred by the statute of limitations; and, again, that a cause of action in that respect had not yet accrued, because the plaintiffs had not paid the judgment in the action of Pond v. Sibley.

The two grounds are evidently inconsistent, and we think neither is tenable. There was a breach of the contract of indemnity as soon as the judgment was recovered, which determined the liability of the plaintiffs (Conner v. Reeves, 103 N. Y. 527; 4 N. Y. State Rep. 216); and that was within six years before the commencement of this action.

We think the nonsuit was improperly allowed, and that it should be set aside and a new trial granted.

All concur.

JONAS P. VARNUM, Receiver, etc., Respondent, v. E.
KIRK HART *et al.*, Appellants.

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Corporations. Insolvency.*—Any arrangement made between the officers and agents of a corporation, when insolvent or in contemplation of insolvency, and various creditors, who were aware of its condition, with a view of transferring any of its property or assets, is utterly void.
2. *Same.*—Section 4, title 4, part 1, chap. 18, Revised Statutes, does not guide, regulate or prohibit creditors from resorting to the customary remedies of the law, though they have knowledge of the insolvency of the corporation.
3. *Same. Creditors.*—Where creditors of an insolvent corporation sold its assets on void judgments, under an agreement to apply the proceeds *pro rata* on their judgments, they are jointly liable for the value of the property.
4. *Same. Equity.*—The court may, in an equity action, direct the manner of enforcing the judgments, so as to secure justice among the defendants.
5. *Same. Estoppel.*—Where a receiver of the insolvent incorporation, on being appointed, converted the assets into money and advertised for claims, and the judgment creditors in question respectively presented as a claim the balance due on their several judgments, which were passed by the referee, appointed to examine the account; and where, in the order confirming the report, it was adjudged that the account of the receiver be settled, allowed and confirmed as therein stated, that he pay over the money *pro rata* to the several parties, and that he be continued in office for the purpose of bringing such further actions and proceedings, as he shall be advised, the right of the judgment creditors to retain the money realized by them on the sale of the property, was not involved or litigated in the proceedings, nor was there an adjudication upon the validity of the creditors' judgments, so as to estop the receiver from afterwards maintaining an action to recover the amount realized by the creditors from the execution sale.
6. *Same. Executions.*—Where the sale was made on both valid and invalid executions, under the agreement to share *pro rata* in the proceeds, and the valid executions are prior liens and of greater amount than the whole of the corporate property sold, the pres-

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ence of the invalid executions do not render the judgment creditors therein liable.

7. *Evidence. Affidavit.*—An *ex parte* affidavit of one of the defendants in an action, containing an admission of facts and circumstances material and pertinent to the issue between himself and plaintiff, is competent as against him, but not as against the other defendants.
8. *Same.*—The admission of incompetent evidence, without objection or motion to strike out, is not error.
9. *Trial. Objections.*—The court may permit a witness to answer a question, against objection where the response may be competent, unless the officer's statement on request as to its nature, show its incompetency.

Appeal from a judgment entered upon the decision of the court.

The plaintiff is the receiver of the Evening Express Printing Company, a business corporation organized under the laws of the state of New York. His appointment was made in an action prosecuted by the people of the state of New York against the said corporation, for its dissolution on account of its insolvency, and he entered upon the discharge of his duties on the twelfth day of April, 1882. The appellant, Hobart F. Atkinson, was receiver of the city bank of Rochester, a banking corporation organized under the laws of the state of New York, and has now moneys in his hands undistributed, which were the property of the bank, subject to the order of this court. From the year 1878 to December, 1882, Charles E. Upton was either cashier or president, and during the years 1881 and 1882 was its president, and during all the time mentioned he was the financial manager thereof and had charge and control of the business of the bank.

In December, 1881, and for a considerable time prior thereto, the said corporation was indebted to the said bank and the appellant Hart and Elwanger, and also to Dorcas Miller. In February, 1882, the bank, Hart and Miller commenced actions on their respective demands against the

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said corporation, and the 3d day of March, 1882, judgments were entered, the one in favor of the bank being \$7,056.60, in favor of Hart \$10,086.27, and in favor of Miller the sum of \$3,130, and docketed in the Monroe county clerk's office. The summons and complaint in each of these actions were served upon C. D. Tracy, one of the directors of the corporation, at the same time, and the judgments were entered, and executions issued thereon, simultaneously to the same officer, and all the personal property, subject to levy and sale on execution, was seized, under and by virtue of these several executions. Before the sale of the property levied upon, the plaintiff was appointed, and qualified as receiver. After such appointment the property was sold for \$20,000, and purchased by Hart and Elwanger. Prior to the third day of March, the said corporation was indebted to the appellant George Elwanger in the sum of \$4,206.43, and on that day he commenced an action against the said corporation, and on the fourth day of March following, the board of directors, by a resolution passed and entered in its minutes, authorized its attorney to appear in said action, and to serve a written offer allowing judgment to be taken against the company in favor of Elwanger for the amount claimed, with costs, and such offer was served and judgment entered on the same day; and in pursuance thereof an execution issued and delivered to the same officer, who held the executions on the judgments before mentioned.

At the time of the commencement of the said actions the said corporation was insolvent, and the said Tracy and the officers of the said bank, and Hart and Elwanger, well knew the fact, and they also knew that it had, for more than a year prior thereto, neglected and refused to pay its promissory notes at maturity.

The remaining assets of the corporation not levied upon by the said executions, the receiver converted into money and distributed among the creditors who presented claims against the said corporation. This action was commenced

in December, 1885, for the purpose of recovering from the defendants the amount of money realized on the sale of said property, upon the ground that the recovery of the said judgments and the sale of the property on the executions was fraudulent and void, and contrary to the provisions of section 4, title 4, chapter 18 of Revised Statutes. The trial court held as matter of law that each of the said judgments and the executions issued thereon were void, and that the same should be set aside; and that the plaintiff, a receiver, recover of Hart, Elwanger, Miller and Hobart F. Atkinson, as receiver, the sum of \$27,294.32, and judgment was rendered in pursuance thereof.

On a previous trial of this action, a judgment for the same amount, in the aggregate, was severally rendered against the same defendant. The amount of the recovery against Miller was the sum of \$3,186.93, from which judgment she never appealed, and on the appeal of the other defendants, the judgment rendered against each of them, severally, was reversed and a new trial ordered.

James Breck Perkins, for appellant Hart; *Joseph Hunn*, for appellant Elwanger; *Arthur Smith*, for appellant Atkinson.

Martin W. Cook, for respondent.

BARKER, P. J.—The receiver who represents the creditors and stockholders of the corporation attacks the validity of the several judgments rendered in favor of the bank, Hart, Miller and Elwanger, on the ground that they are void, and a fraud upon the statute enacted for the purpose of securing equality in the distribution of the property and assets of insolvent corporations among its creditors, which declares that whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie or lawful money of the United States, it shall not be lawful for such company, or any of

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its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly for the payment of any debt, and it shall not be lawful to make any transfer or assignment, in contemplation of the assignment of such company, to any person or persons whatever, and every such transfer and assignment to such officer, stockholder, or other person, or in trust for them, or their benefit, shall be utterly void. Chap. 18, part 1, sec. 4, tit. 4 of the Revised Statutes.

The object of this statute is to prevent all intentional preferences among the creditors of insolvent corporations, and to secure an equality of distribution among its creditors.

Every agreement or arrangement made between the officers or agents of the corporation when insolvent or in contemplation of insolvency, with a view of transferring or assigning directly or indirectly any of its property or assets to any of its creditors, contravenes the policy of the statute, and is utterly void.

At the time the actions were commenced by the service of the summons and complaint on Tracy, one of the directors of the corporation, and the general manager of its affairs, he well knew that the company was financially embarrassed and insolvent. For a considerable time prior thereto the bank and Hart were pressing the payment of their demands, and they also knew the company was unable to pay its debts in full. The trial court found that Upton, acting as president of the bank, and Hart had consultations and negotiations with Tracy, which resulted in the arrangement or understanding that actions were to be commenced against the company upon their several notes and demands and that the papers should be served upon the said Tracy as one of the directors of the company, who should conceal the fact of such service until the time for the corporation to answer in each of said actions had expired—so that judgments might be entered in each of said

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actions without the knowledge of the other directors of the said company or any other of its creditors. The further fact is also found, that such arrangement was made so that the bank, Hart and Miller might be enabled to procure a preference over the other creditors of the corporation. The summons and a verified complaint, in each of said actions, were served on Tracy, who concealed the fact of the commencement of the actions until after judgments were entered and executions issued and levied on the personal property of the company, which was afterwards sold thereon. The evidence fairly supports these conclusions, and our examination of the evidence convinces us that the arrangement entered into between those parties was to secure a preference in payment over the other creditors of the company.

If these judgments are upheld as valid, then the plaintiffs therein have secured a priority in payment for the greater part of their respective debts to the detriment of the other creditors of the corporation. The arrangement made with Tracy for the commencement of these actions, and his agreement to conceal the fact from the other officers of the company until a lien was placed on the personal property, subject to levy and sale on execution, was manifestly made because the company was insolvent, and that they knew the fact, and that their purpose was to secure, by means of the levy, a preference in payment over the other creditors. If that was not the mind of the parties who conducted the negotiations, no sensible reason can be assigned for their action, which was exceptional as between debtors and creditors who had no ulterior purpose in view.

By obtaining the judgments, and issuing executions thereon, and the levy upon and sale of the property, a transfer of the same was made to the plaintiffs in those judgments, within the sense and meaning of the statute. *Brouwer v. Harbeck*, 9 N. Y. 589; *Kingsley v. First Nat. Bk. of Bath*, 31 Hun, 329.

The intent of the statute was to enjoin the officers of an insolvent company from making a transfer or assignment of any of its assets ; and if this restraint is disregarded the transfer is void, and the parties to whom the same is transferred, either directly or indirectly, acquire no title to the property. The statute does not attempt to guide or regulate the action of creditors seeking to collect or secure their debts, nor restrain them from resorting to the customary remedies of the law to enforce the payment of their debts from the corporation, although they may have knowledge of its insolvency.

The restraint of the statute is imposed upon the company and its officers, acting separately or collectively, and it is their unlawful conduct that vitiates the transfer or assignment, and makes the same utterly void. Had the pursuing creditors procured their judgments without any agreement or concert of action with Tracy, then they would be entitled to the money which they have realized by the sale of the company's property under their respective executions. But in view of their arrangement with Tracy, their judgments cannot be used as instruments to secure the payment of their debts, because they conspired with an officer of the company and induced him to violate a duty which he owed to the other creditors of the company, that they might secure a preference in the payment of their debts. It was the duty of Tracy, having charge of the affairs of the company and conscious of its insolvency, to do all in his power to carry out the policy of the statute, and to do whatever he might to place all the creditors in a condition of equality. His agreement to remain silent when it was his duty to proclaim the financial condition of the company, and the pursuit of particular creditors, was unlawful, corrupt and a betrayal of his trust, which the agent and the representative of the bank and the other parties instigated. When the suits were first commenced by service of process on Tracy, it was his first duty to notify the other directors, and if they were unable

to satisfy in some manner the impatient and pursuing creditors, so that they would delay action, then to have taken prompt measures to secure a general distribution for the benefit of all the creditors, and we are to presume that they would have done so had they been notified by Tracy that these actions had been commenced. Morawetz on Corporations, § 863.

We concur with the learned trial judge in his conclusion, that Upton acted as Hart's agent in bringing the action on his note, and they acted in concert in all the steps which were taken for the purpose of securing a prior lien on the personal property of the company, and that the illegal agreement made between Upton and Tracy, to suppress the fact that actions had been commenced, invalidates his judgment and deprives him of all advantage sought to be acquired by the levy and sale under his execution.

The appellants urge as a defence, in bar of a recovery, that the plaintiff is estopped by the previous adjudication of this court in proceedings instituted by him relative to his receivership, in which it was determined, as they claim, that their respective judgments were valid and the company's property rightfully levied upon and sold. The receiver converted the assets which came to his hands into money, and then advertised for the presentation of claims of creditors in the manner required by statute. The appellants, respectively, presented, as a claim or demand due from the company, the balance due on their judgments after crediting the sum realized on the executions. The facts upon which the claim of estoppel is based are substantially the same in the case of each appellant, and for convenience, Hart's Case, on this subject, will be examined separately, and our determination thereon will determine the question as to the other appellants. His original claim was for money loaned the company, for which he held its note dated December 1, 1876, signed by the said Tracy and others, as suréties, and upon this note the judgment was

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rendered. That this was a debt for the company to pay is not disputed. In making proof of his claim, Hart presented to the receiver a copy of the docket of his judgment, certified by the county clerk, on the face of which the amount realized on the execution was credited and deducted from the amount of the judgment, to which was attached Hart's affidavit, in which he stated "that there remains due to defendant on said judgment the sum of \$2,046.08, with interest thereon from April 19, 1882, no part of which has been paid, and to which there are no offsets either in law or in equity."

Afterwards the receiver gave notice that on a day named therein he would render to the court "a full and accurate account of all his proceedings," and requested the appointment of a referee to examine the same and report thereon. At the time mentioned he presented a petition to which he attached an account of the moneys collected and paid out by him, and also a list of the claims, headed, "claims presented," in which Hart's name appeared, and his claim was mentioned as a balance due on judgment, \$2,046.08. In the petition reference is made to the list of creditors as "statement of the claims against the defendant, which have been presented to me and which appear to be valid, legal and just claims."

In the order of reference the referee was directed to examine and report upon the account, and to hear and examine the proofs, vouchers and documents offered for and against the same. At this time no dividend had been made by the receiver.

The referee, in his report, states that he had examined the account, and no objections were made and no evidence given in regard to the same by either party, and, in his opinion, the same should be passed as rendered by the receiver. In the order confirming the report, it is adjudged that the account of said receiver be settled, allowed and confirmed as therein stated. And it was further ordered,

that the said receiver pay over the balance of the money in his hands *pro rata* to the several parties, who have proved their claims as mentioned in the report. And it was also further ordered, "that such receiver be continued in office for the purpose of bringing such further action, or actions, and take such further steps and proceedings as he should be advised."

This statement of the proceedings had on the accounting fully presents the legal proposition, for which the appellant Hart contends, that this court did, in those proceedings, pass upon and affirm the validity of his judgment, and the receiver cannot again litigate that question. As between the receiver and Hart, the real and only question presented was, whether the amount claimed to be due Mr. Hart was just and equitable as a basis and a guide in making a distribution of the assets among all the creditors. The validity of the judgment was not in issue, and whether the same was procured by collusion and in violation of the statute, the claimant, Mr. Hart, was justly entitled to share in the distribution, on the basis that the sum due him was not less than the amount stated in his claim presented to the receiver.

In his petition to the court, the receiver simply admitted that the claim presented against the company was just and valid. The question now in issue—that is, the right of the appellant to retain and keep the money realized by him on the sale of the property—was not involved or litigated in those proceedings.

When the receiver was appointed, the property sold had been levied upon and was in the custody of the sheriff. If no execution had been issued on the judgment until after the receiver's appointment, and after he had acquired possession of the property, no occasion could have arisen for him to inquire as to the validity of the judgment, for if that had been the case, none of the creditors would have been

deprived of their just rights to share in all the assets of the company.

We see no force in the point that Hart received less on the distribution made than he would have done if he had presented a claim for the amount of the original indebtedness, for upon a distribution of the money to be collected from the defendants on the judgment in this action, the amount received on the first dividend may be taken into consideration to secure equality among the creditors.

The order confirming the referee's accounts and directing a distribution of the moneys in his hands among the several parties who had proved their claims, does not in terms hold or declare the judgment in question to be valid; nor was it necessary for the court to consider and determine whether it was void as contravening the policy of the statute. The single question for the receiver to examine and the court to determine in those proceedings was, did the company owe Mr. Hart the sum of money which he claimed; and in any view which can be taken of the case, it did. The receiver did not contend to the contrary, and no issue was joined between him and Hart on any question. The order in terms continues the receiver in office, and reserves to him the right to prosecute any other or further actions and take such further steps and proceedings as he shall be advised. This provision of the order left open for further examination every question not actually or necessarily determined by the decretal order.

We are unable to discover a state of facts upon which to base an estoppel, *in pais*, against the receiver, giving a careful consideration to the argument of the learned counsel on this point.

The relief granted to the plaintiff in this action was the cancellation of each of the judgments in controversy and setting aside the several executions issued thereon, and the recovery of a joint judgment against all the defendants for the value of the property and interest thereon, together

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with the costs, which amounted to the sum of \$27,721.65. Each of the appellants contend that if they are liable in damages for the seizure and sale of the property of the company, the recovery should be several and not joint and limited in amount to the sum received by each on his several judgment, or at least to the amount of his judgment.

The appellants caused execution to be issued on their judgment, with directions to the sheriff to levy upon and sell the personal property of the company. Before the sale took place, the appellants entered into a written agreement which in effect provided that the proceeds of sale should, as between themselves, be applied *pro rata* on their respective judgments on the basis of the amount of each, the same as if the executions had all been issued simultaneously to the sheriff. This concert of action between them, together with their previous individual actions, made them joint tort feors, as all of the judgments were void. The judgments being set aside for this reason, they were jointly liable for the value of the property seized and sold. The rule is, that all who command, advise or countenance the commission of a trespass by another, or who approve of it after it is done, are liable if done for their benefit, in the same manner as if they had committed the tort with their own hand. The slightest interference with the property of another and a claim of dominion over it renders the wrongdoer liable for the commission thereof.

By their written agreement the appellants combined and agreed together that they would, by the use of void judgments, convert the plaintiff's property into money for the purpose of distributing the same among themselves.

This purpose they carried into effect. There can be no doubt but each is liable for all the damages resulting to the other creditors from the execution of their common and illegal purpose. We think, however, as this is an equitable action, the court may direct the manner of enforcing the judgment, and in the first instance require the plaintiff

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to issue executions against the property of each of the defendants for the amount which each received from the avails of the property sold, and in case of failure to collect from either of the defendants the sum received by him with interest, and his just proportion of the costs, then an execution may be issued against all the defendants for the unpaid part of the judgment.

We think it would be proper for the judgment to contain a provision, requiring the receiver of the bank to pay out of any funds in his hands applicable to that purpose, the amount received by it on its judgment. Such a provision in the judgment invites no issue between the defendants, but simply provides the way and manner of collecting a judgment for which all are liable, and the same in legal effect remains a joint judgment. Code, §§ 521, 1204; *Derham v. Lee*, 87 N. Y. 599.

On the former trial several judgments were rendered against the defendants for the amount of money which they had received upon their respective executions. From that judgment the defendant Miller did not appeal, and that judgment as against her stands, and this judgment is also in form and against her, from which she does not appeal. Although she has assented to the form of the judgment as rendered on the trial now under review, we see no reason why we may not modify the form of the judgment as to the mode and manner of collecting the same, as it does not increase her liability under the judgment.

Exceptions were taken by the defendants to the reception of evidence offered against them, which they insist should be sustained. We have examined all of them, and have reached the conclusion that none of them were well taken, but will briefly refer to some of the most serious. The plaintiff offered in evidence, as against all of the defendants, the *ex parte* affidavits of the defendant George Elwanger, and George H. Elwanger, and Francis E. Rew, all of them purporting to have been taken in the action of The People

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v. The Company, in which the receiver was appointed, before the commencement of the action. An objection was interposed by all of the defendants, on the ground that they were immaterial and incompetent, which was overruled and an exception taken in behalf of all the defendants.

We are of the opinion that portions of the affidavit of George Elwanger were competent as against him, as containing an admission of facts and circumstances material and pertinent to the issue joined between him and the receiver.

We are also of the opinion that this affidavit was not competent as against the other defendants, nor was either of the other affidavits competent as against any of the defendants. There is a technical answer to this exception, as it appears that a portion of the evidence offered was competent as against the defendant, George Elwanger. The three affidavits were offered together as evidence against all the defendants. The objection interposed was by all the defendants, and the exception taken was in behalf of all. If the objection in the form in which it was made had prevailed, then evidence competent for a particular purpose, as against one of the defendants, would have been excluded. Hence the rule, that when the evidence offered is competent as against one of the parties, an exception by all to the ruling of the court receiving the same is not available. *Black v. Foster*, 28 Barb. 387; *Doyle v. N. Y. Eye and Ear Infirmary*, 80 N. Y. 631; *Magee v. Bader*. 34 Id. 247.

As this case was tried by the court, the rule should be strictly adhered to, as it is fair for this court to assume that the trial court limited the use of the evidence to legitimate purposes.

An exception was also taken to an item of evidence given by the witness Rew, who was one of the trustees of the company. He had stated, without objection, that after the executions were placed in the hands of the sheriff, he and George H. Elwanger had an interview with Upton at the

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bank. He was then asked by the plaintiff this question: "What was said?" To this question all of the defendants made an objection without assigning any ground upon which it was placed. The case states that the evidence was received as against the receiver and Hart, and thereupon the latter took an exception. If Upton could have said or done at that interview anything binding upon any of the defendants, then the objection was not well interposed, and the exception by Hart was unavailing. We are not able to say that Upton could not, as he was then the president of the bank and agent, and acting for Hart in the collection of his judgment. The plaintiff was not asked to state the nature and character of the answer which he expected the witness would give in response to the question, so we think the court committed no error in allowing the same to be answered. The witness did, in his answer, testify to statements and confessions made by Upton, which was clearly incompetent as against Hart. The defendant, Hart, had ample opportunity to renew an objection in his own behalf, before the witness gave the objectionable evidence, and as he failed to do so, or to move to strike out the evidence after it had been received, it is to be presumed that by his silence he was willing that it should remain in the record.

The judgment should be modified as suggested as to the mode and manner of collecting the judgment; and, as modified, affirmed, with costs of this appeal.

All concur.

**MICHAEL WOLLUNG, Respondent, v. JANE AIKEN, et al.,
Appellants.**

Supreme Court, Fifth Department, General Term, June 22, 1889.

1. *Mortgage. Foreclosure. Resale.*—An application for a re-sale of the mortgaged premises, on foreclosure, is addressed to the discretion of the court, where no legal error is pointed out, and the sale was conducted with strict regularity.
2. *Appeal. Discretionary order.*—An appeal does not lie to the general term of the supreme court from an order of the county court resting in its discretion, though affecting a substantial right.

Appeal from an order of the county court, in a foreclosure action, denying a motion to set aside a sale of the premises under the judgment.

Tracy Becker, for appellants.

E. L. Parker, for respondent.

BARKER, P. J.—We discover no error or irregularity on the part of the plaintiff, in the proceedings, subsequent to the entry of judgment. The premises were purchased by the defendant, Mrs. Aiken, on her bid of \$1,900, which is about one-half of their market value. She is the beneficiary named in the trust deed, referred to in the affidavits.

The defendant, Aiken, the husband of the purchaser, does not live and cohabit with his wife, and he intended to be present at the sale and bid for the same their full market value; but he was misled as to the place of the sale, as he states in his affidavit, and failed to be present for that reason. His statement, in this respect, we receive as truthful. Indeed, it is not disputed by the plaintiff or the purchaser.

The circumstances of the case, as disclosed by the affida-

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vit, are such, that the county court could have, with the greatest propriety and justice, ordered a resale. The purchase money will no more than pay the mortgage and costs of foreclosure, and the title to the premises which was vested in the trustee is gone, and the trust terminated. But as no legal error has been pointed out, and the sale was conducted with strict regularity, the application for a resale was addressed to the discretion of the court. The moving parties ask for relief as a matter of favor.

Under the provisions of section 1842, allowing an appeal to be taken to this court from an order of the county court, affecting a substantial right, does not include an order resting in the discretion of that court, and this court is without power to review orders made in that class of cases. This court can only reverse for error of law committed by the court below.

A few of the cases sustaining this rule are cited. *Thurber v. Townsend*, 22 N. Y. 517; *Reilley v. President, etc.*, 102 Id. 383; 2 N. Y. State Rep. 419; *Stebbins v. Cowles*, 30 Hun, 523; *Wavel v. Wiles*, 24 N. Y. 635; *Tanner v. Marsh*, 53 Barb. 438; *Osborn v. Nelson*, 59 Id. 379; *Bowen v. Widner*, 12 Week. Dig. 525.

The order should be affirmed, with ten dollars costs and disbursements, to be paid by the defendant Aiken.

All concur.

EUGENIA A. PENFIELD, Respondent, v. NEW YORK AND
MOUNT VERNON WATER CO., Appellant.*Supreme Court, Second Department, General Term, June 28, 1889.*

Negligence. Liability.—An agreement requiring the defendant to enter upon plaintiff's land for the purpose of filling in, grading and making an embankment thereon so as to confine the defendant's pond and prevent it from overflowing plaintiff's land, and for this purpose to use her old retaining wall along the creek, as a condition to her consent to his raising his dam, is no excuse for the construction of the dam beyond its former height, in the absence of his performance of such precautionary measures, and is no defense to an action for negligence in raising the dam, whereby plaintiff's land was overflowed; and a refusal to admit such agreement in evidence on the trial of the action, when offered by defendant, is no ground for the reversal of a judgment in favor of plaintiff.

Appeal from a judgment entered on a verdict, and from an order denying a motion for a new trial made upon the minutes.

Stephen J. Stillwell (*Norman A. Lawlor* of counsel), for respondent.

Frank N. Glover, for appellant.

BARNARD, P. J.—The defendant had a pond of water, with a dam about six feet high. The stream which filled the pond was along the plaintiff's land and the old dam backed the water up to the plaintiff's land to a very small extent.

The defendant raised this dam three feet, and of course flooded the plaintiff's land to an extent three feet perpendicular rise beyond the old overflow. Before doing this the parties entered into an agreement that the defendant should have the right to enter upon the plaintiff's land and to fill in and grade the same so as to prevent the water

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from overflowing the same, and for that purpose the defendant was permitted to use the old retaining wall of plaintiff's along the creek. The rise in the dam injured the plaintiff by casting water on her lot and she sued to recover her damages. The jury has found a quite severe injury. The complaint is formed as for a negligent construction of the dam. The answer is a general denial in this respect. The defendant offered the agreement in evidence, and it was rejected under the pleadings so that the case was tried as an unpermitted construction of a dam beyond its proper height. The paper, if admitted, did not change the relation of the parties.

Assuming that the paper is a license, the defendant was to make an embankment so as to confine the pond to its old position as respects the plaintiff, except that her bank was to be raised and the water was to rise perpendicularly.

The defendant failed to do this, and the agreement would be no excuse for the omission. A charge for negligently building the dam would be supported by the jury even if the dam proper was well constructed. The defendant agreed to make a good dam along plaintiff's land.

The evidence in the fact of this injury was conflicting and the jury have found upon the issue. The plaintiff was not as written of her guilty of contributory negligence.

She only objected to destroying her retaining wall. The difficulty was from the lack of filling behind it.

The judgment should be affirmed, with costs.

All concur.

STEPHEN A. PERKINS, Appellant, v. GEORGE D. EIGHMIE,
Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Negligence. Landlord and tenant.*—Where a landlord, who furnished steam for heating purposes and to operate machinery in his building, as soon as he discovered a defect in the boiler, employed a workman to remedy the defect, he is not liable to the lessee of rooms in the building for injuries to his property resulting from an explosion of the boiler while in the hands of the mechanic, even though it was occasioned by the latter's negligence in repairing the defect.
2. *Same. Master and Servant.*—The relation of master and servant does not exist between the landlord and the mechanic employed to repair the boiler.

Appeal from a judgment entered upon an order granting a nonsuit, and dismissing the complaint.

O. D. M. Baker, for appellant.

G. & G. H. Williams, for respondent.

DYKMAN, J.—The defendant in this action was the owner of a building in the city of Poughkeepsie, and in the month of September he rented to the plaintiff five rooms on the second floor of the building for a residence. The other part of the building was used as a factory, and in the cellar there was a boiler to make steam for the machinery in the factory and to furnish heat.

The plaintiff went into the possession of the rooms and occupied them until the night of the 8th of November, 1888, when the boiler exploded and set fire to the building, which was entirely destroyed, and with all the household prop-

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erty and goods of the plaintiff amounting in value to about \$1,500.

There was no defect discovered in the boiler until the morning of November seventh, the day previous to the explosion, when a slight leak was discovered, and the steam was let down to permit the reparation of the boiler, but on the morning of the eighth, the leak continued and again the steam was run down and a mechanic employed to repair the defect. That night, and while the boiler was yet in charge of the person employed to remedy the defect, the boiler from some cause unknown exploded and caused the fire which wrought the destruction.

This action is against the defendant for the recovery of the damages he has sustained by the destruction of his property by the fire.

The complaint was dismissed on the trial at the close of the plaintiff's case, and he has appealed from the judgment.

We discover no evidence in the case sufficient to charge the defendant with negligence. The boiler had been in use for a considerable time, and although it may have been small for the purposes for which it was used, yet no imperfection or defect had been discovered, and no attention had been directed to any weakness in any part of the iron. Even the opening which permitted the leakage was neither serious nor dangerous.

If there was any negligence on the part of the person employed to repair the boiler, which resulted in the disaster, the defendant cannot be chargeable therewith. The person so employed was a skillful mechanic, and the work was left entirely with him. The relation of master and servant did not exist between him and the defendant. He was employed to obviate the difficulty discovered in the boiler, and the manner of so doing was left entirely to his judgment and discretion.

This part of the case is covered by the cases of *King v. The R. R. Co.* (66 N. Y. 181); *Hexamer v. Webb* (101 Id.

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377; 1 N. Y. State Rep. 46); Olive v. Whitney Marble Co. (103 Id. 292; 3 N. Y. State Rep. 66).

The judgment should be affirmed, with costs.

PRATT, J. concurs; BARNARD, P. J., not sitting.

ELBERT W. HAWKHURST, Respondent, v. THOMAS J. RICH,
as Administrator, etc., Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Bills, notes and checks. Consideration.*—The signature of a decedent to a note presumably constitutes a consideration.
2. *Same.*—A note given for an amount ascertained to be due the payee by reason of the makers selling, without the former's notice and permission, personal property belonging to him, is founded upon a sufficient consideration.
3. *Evidence. Burden of proof.*—A statement in a note that it was given "for value received," is sufficient to throw upon the administrator the burden of proving that it was *nudum pactum*.

This is a proceeding under the statute to establish a claim in favor of the plaintiff against the administrator of his father's estate. The claim is based upon a note made by defendant's testator, and the defense is that the note was without consideration.

Appeal from a judgment entered on the report of a referee, and from an order granting costs.

E. G. Dewall, for respondent.

George C. Brainerd, for appellant.

BARNARD, P. J.—The signature of the deceased to the note presumably made out a consideration for the paper.

It stated that it was given for value received, and that was sufficient to throw upon the administrator the burden of proving that it was given for nothing.

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The cross-examination of the claimant makes out an abundant consideration. The deceased had a title to a piece of land in his own name, which really belonged to himself and the claimant together. The plaintiff had personal property on the farm, and the deceased sold the farm without notice to him, and thereby occasioned loss on the sale of the plaintiff's personal property by reason of its forced sale out of season.

The deceased and the claimant went over the items of loss together, "and they agreed upon the amount due." The amount was \$550, out of a claim of \$852.35. The note was given for the sum of \$550. The note rests upon as sure a foundation as if the father to give \$550 for the right to sell a farm occupied by his son, and in which he was a half owner, without a formal title at a time when the sale would be beneficial to the father, and injurious to the son. The costs were properly ordered under the case of *Denise v. Denise*, 110 N. Y. 562; 18 N. Y. State Rep. 873.

The judgment should, therefore, be affirmed, with costs.

All concur.

THE VILLAGE OF PORT JERVIS, Respondent, v. ERNEST M. CLOSE, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Municipal corporations. Ordinances.*—An ordinance prohibiting the sale of merchandise at auction in a village without a license, is general, and applies to all persons alike, selling at auction at any place within the village, except, perhaps, at judicial sales, and public sales of second-hand furniture.
2. *Same. Power.*—Selling at auction is properly within the power of the state to regulate.
3. *Same. Defense.*—It is no defense, in a proceeding to recover for a violation of this ordinance, that others, who have violated it, have not been prosecuted therefor.

Appeal from a judgment of the county court, affirming judgment rendered by the police justice.

Section 116 of the by-laws and ordinances of the village of Port Jervis, entitled "License for sale of merchandise at auction," provides :

"§ 116. Be it ordained, that sales of merchandise at auction, except legal sales and sales of second-hand household goods, shall henceforth be prohibited within the village of Port Jervis, unless a license fee of five dollars for each day of such sale shall first have been paid, and a license therefor issued by the president of said village. Upon payment of such fee to him, the president of the village is authorized to issue such license. Each and every person violating any of the provisions of this ordinance shall forfeit and pay the sum of ten dollars for each day of such violation."

John W. Lyon, for appellant.

C. E. Cuddeback, for respondent.

PRATT, J.—This action was brought to recover penalties for alleged violations by the defendant of section 116 of the

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by-laws and ordinances of the village of Port Jervis in relation to the sale of merchandise in said village, without first procuring a license according to the provisions of the ordinance cited.

The judgment was rendered by a police justice of the village and affirmed by the county court from which defendant appeals.

There seems to be no dispute about the facts, as the defendant himself admitted that he violated the ordinance as charged.

We think the passage of such an ordinance was clearly within the powers conferred by the village charter by chapter 370 of Laws of 1873, § 51, which provides that "It shall be the duty of the trustees, and they shall have power to prohibit or regulate and license auction sales in said village, and hawking and peddling, or stands for the sale of goods, merchandise, or other articles, in the streets and public grounds of said village, etc."

The defendant claims that because he leased a store in which to hold his auction, he is not liable; or, in other words, that the ordinance in question only applies to streets and public places, and that if he hired a place indoors for a few days, he could evade the ordinance.

In our view the ordinance was general and covered all sales at auction, except, perhaps, judicial sales and second-hand furniture. It was intended to apply to the business of auctioneers carried on in the village.

The ordinance was reasonable in its terms, and applied to all persons alike who should attempt to engage in that business.

Long and learned arguments have been indulged in by the counsel, but it is clear that the ordinance was within the act of legislature creating the charter, and that it is within the police powers which the legislature can exercise.

Selling at auction is essentially public in its character,

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and properly within the power of the state to regulate. *Brooklyn v. Breslin*, 57 N. Y. 591.

It was no defense to this proceeding that others had violated the ordinance and not been prosecuted. If we assume that defendant's construction of the ordinance before quoted is correct, and that it only refers to auction sales upon the street or public places, yet it may well be that, under subdivision 37 of the same section, the trustees had power to regulate public auctions by "passing such by-laws, as they deemed necessary and expedient, for the good government of the city;" but it is not necessary to go to that section, as the power is clearly granted in the previous subdivision.

There is nothing unjust or oppressive in the ordinance, and it cannot be said to be in restraint of trade.

We have examined all the exceptions and find no error.

Judgment affirmed, with costs.

All concur.

JOSEPHINE MCQUADE, as Administratrix, etc., Respondent,
v. WILLIAM ADAMS, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

Appeal. Weight of evidence.—In an action to recover moneys loaned by plaintiff's intestate, where the evidence of payment is uncertain in time and amount, and rests wholly upon the testimony of defendant, a verdict in favor of plaintiff, based upon the admission of defendant, should not be disturbed.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

W. J. Powers, for appellant.

Henry. D. Birdsall, for respondent.

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BARNARD, P. J.—The complaint stated a loan of moneys by the plaintiff's intestate to the defendant, and claimed a balance of \$766, with interest. The answer admitted that the deceased loaned to the defendant various sum of money without stating the amount; and averred payment. Upon the trial it was proved that just after the death of the intestate the defendant stated to the administratrix that he owed the deceased for sums of money borrowed. Upon the trial the defendant testified that he borrowed \$2,000 in all, and he testified to a full payment of the entire loan. The refusal of the trial judge to permit the defendant to answer a question calling for a statement of a payment by defendant to deceased, was subsequently cured by the admission of the answer. The fact of payment thus became the only question for the jury to pass upon. The evidence of payment is uncertain in time and amount, and rests almost wholly upon the testimony of the defendant. The narrative is so rambling that an appellate court could not interfere with the verdict of a jury upon it. It is irreconcilable with the admission made to the widow just after her husband's death.

The judgment should, therefore, be affirmed with costs.

PRATT, J., concurs; DYKMAN, J., not sitting.

**JOHN R. HINZ, as Administrator, etc., Appellant, v. JOHN
H. STARIN, Respondent.**

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Default. Terms of opening.*—The plaintiff, who is regular in his practice in taking a default, should not be required to try the cause upon the printed case, as a condition of an immediate trial.
2. *Same.*—But in such case, pecuniary terms should be imposed upon the defendant, as a condition for the favor granted him.

Appeal from a judgment entered at special term.

Martin J. Keogh, for appellant.

Wm. W. Goodrich, for respondent.

DYKMAN, J.—This is an appeal from an order opening a default and setting aside an inquest taken in this action at the March circuit in Westchester county against the defendant in favor of the plaintiff.

There was a disagreement between the attorneys in relation to the trial of the cause and the counsel for the plaintiff was entirely justifiable and regular in bringing the same on for trial, yet under all the circumstances it was wise to open the default and set aside the inquest upon proper terms.

We do not think, however, that the discretion of the court was wisely exercised in relation to the terms, first because it obliged the counsel for plaintiff who was regular in his practice to try the cause upon the printed case if he went to trial that week. That condition obliged the plaintiff to do what the presiding judge at the circuit could not require him to do when there was nothing in his conduct or condition to justify the imposition of such a condition.

We think, also, that pecuniary terms should have been imposed as a condition for the favor granted to the defendant.

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The defendant should have been required to pay \$100 to the counsel for the plaintiff, thirty dollars trial fee and ten dollars for opposing the motion to open the default and the legal disbursements for the March term of the court. The order should be modified in the respects mentioned, and as so modified affirmed, without costs.

BARNARD, P. J., concurs ; PRATT, J., not sitting.

CHARLES S. HIGGINS, *et al.*, Appellants, v. JAMES D. BELL, as Commissioner of Police and Excise of the City of Brooklyn, Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

Brooklyn. Boiler inspection.—The act of 1873, which gives to the board of police and excise of the city of Brooklyn power to inspect steam boilers, was not repealed by the general act of 1874. Boilers, which have been inspected and duly certified by an insurance company, are not exempt from inspection under the former act.

Appeal from an order denying a motion on the part of the appellant herein, to continue a temporary injunction obtained by them restraining the respondent from inspecting their steam boilers in the city of Brooklyn, on the ground that they are exempted by law from such inspection by virtue of chapter 614 of the Laws of 1874—appellants being in possession of the guaranteed certificates, unrevoked and in full life, of an insurance company organized for the purpose of making guaranteed steam boiler inspections.

Laws of 1873, chapter 863, provides a charter for the city of Brooklyn, and *inter alia* created a board of police and excise, and gave to that board power to inspect steam boilers in the city.

Sonter & Stedman, for appellants.

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Frank E. O'Reilly (*S. H. Daily* of counsel), for respondent.

PRATT, J.—The act of 1873 was a special local act forming a system of government for Brooklyn. By well settled principles, the general act of 1874 would not effect a repeal of the special act; especially is this so as the scope of the act of 1874 is limited to an amendment of the acts of 1862 and 1867, which were not in force in Brooklyn.

It follows that the exemption from police inspection granted by the act of 1875 did not extend to boilers within the city of Brooklyn. They were continually subject to the provisions of the charter of 1873.

The act of June 9th, 1888, combining all the Brooklyn acts, expressly imposes upon the commissioner of police the duty of inspecting steam boilers. Were it the intention of the legislature to exempt from such inspection such boilers as were insured, we must believe they would have found means to express their purpose.

The order appealed from must be affirmed, with costs.

All concur.

IDA L. TOOKER, Respondent, v. JOHN S. ACKERLY,
Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Trial. Referee.*—A referee must disregard testimony, discredited by numerous contradictions and improbabilities.
2. *Defenses.*—In an action for an accounting for money entrusted by plaintiff to defendant for investment, a release, executed by plaintiff, to be delivered to defendant on return of certain letters, but obtained by pretending to give them up, without doing so, is no defense.

Appeal from a judgment entered upon the report of a referee.

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Joseph S. Ridgway, for appellant.

Levi A. Fuller, for respondent.

BARNARD, P. J.—The complaint alleges that plaintiff delivered to defendant about \$3,000 with which to make investments for plaintiff's benefit, and avers that defendant invested a portion of that amount in a house in Brooklyn, taking the title in his own name.

Relief is prayed that defendant account for all the moneys so confided to him, and that he be decreed to convey the house to plaintiff, etc.

Defendant's answer admits receiving various sums of money from plaintiff, but denies that it was confided in trust for plaintiff.

Upon the issue of fact thus raised there was no direct evidence but that of the parties themselves. The principal criticism that can be made of plaintiff's testimony is that it was unreasonable for a woman of supposed good judgment to entrust considerable sums of money to a young man of twenty-three, of no business experience, to be invested at his discretion. But that criticism is answered by defendant's own evidence, which shows that plaintiff, whether wisely or not, had confidence in his business judgment, and frequently consulted him respecting investments she was contemplating, from some of which he seems to have dissuaded her. It being established that plaintiff had faith in defendant's business sagacity, there seems no reason to doubt her statement that she entrusted defendant with money to invest.

The testimony of defendant abounds in contradictions and improbabilities. He testified falsely about his age, obviously to make it appear more credible that plaintiff proposed to "adopt" him as a son. He testified that all the money he received was expended in various ways, with plaintiff's approbation. The opinion of the referee points

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out that defendant placed the money in a savings bank to his credit, where it remained until the house was purchased, into which the funds were traced.

The statement of defendant that he consulted plaintiff's mother and sister about her giving him such sums of money, and that they told him to accept it without scruple, as she had nobody but him, is too incredible for discussion.

The referee had no option but to disregard the testimony of a witness so discredited.

The general release pleaded never took effect, and is no defense. By its terms, it was executed in consideration of the surrender of certain letters.

Being left in custody of plaintiff's attorney, to be delivered simultaneously with the transfer of the letters, defendant got possession by pretending to give them up, when, in fact, he did not do so. The attorney had no authority to deliver the release until defendant complied with the condition. *Murray v. Earl of Stair* (2 B. & C. 82), is in point. See, also, *Wilson v. Powers*, 131 Mass. 539; *Ware v. Allen*, 128 U. S. 590, 596; *Davis v. Jones*, 17 C. B. 684.

Judgment affirmed, with costs.

All concur.

CONRAD LOBHARDT, Respondent, v. ANNIE GILBERT,
Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

Appeal.—The appellate court will not disturb a verdict and judgment, where there is no question of law involved, and the testimony is abundantly sufficient to sustain them.

Appeal from a judgment of the county court, affirming a judgment recovered in a justice's court.

William J. Gaynor, for appellant.

Edward Grosse, for respondent.

DYKMAN, J.—This action was commenced in a court of a justice of the peace for the recovery of a bill for painters' work and other services. A recovery was had against the defendant, from which she appealed to the county court of Kings county, where there was a new trial before a jury, and a verdict for the plaintiff for eighty dollars.

The defendant has appealed from the judgment entered upon the last verdict to this court, but we are unable to afford her relief. The testimony on the part of the plaintiff is abundantly sufficient to sustain the verdict and judgment if it commanded the belief of the jury as we must now assume it did.

In the first instance there was a written contract between the parties under which the plaintiff performed some work. He excuses his failure to complete the labor under the agreement, and then shows that he did other work not included in the contract. The defendant, in her testimony, denied many of the statements of the plaintiff, but all the evidence went to the jury, and the verdict is the result.

Opinion of the Court, by DYLMAN, J.

No questions of law are involved, and the verdict has settled the facts in favor of the plaintiff.

The judgment should be affirmed, with costs.

All concur.

ROBERT GEDNEY, Appellant, v. JULIA A. PRALL, Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

Partition. Ouster.—The exclusive possession for more than twenty years by one co-tenant under a claim of absolute ownership, the hiring of the premises to the other co-tenant, and demand from him of the entire rent, constitute an ouster such as will bar the latter from maintaining an action for partition.

George W. Winant, for appellant.

A. & A. X. Fallon, for respondent.

DYKMAN, J.—This is an action for partition or sale of real property, and after a trial by the court without a jury, a judgment was rendered in favor of the defendants, from which the plaintiff has appealed.

In January, 1864, the premises in question became the property of John P. Smith, James P. Smith and Margaret Ann Gedney, as tenants in common, and they entered into possession of the same as such.

When Margaret Ann Gedney became the owner of the undivided third of such premises she was the wife of the plaintiff in this action, and she died in May, 1864, leaving one child living born of her marriage with the plaintiff. The wife died intestate, as we assume.

On the 1st of November, 1864, the plaintiff conveyed the interest of his child in the premises to John P. Smith and James P. Smith, who were then her co-tenants in common,

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under proceedings to sell her real estate as an infant, instituted for such purpose.

Subsequently, and in July, 1868, Daniel D. Demarest, as assignee in bankruptcy of John P. Smith and James P. Smith, sold and conveyed the premises to Horatio G. Prall and Richard P. Eells. Mr. Prall died seized of one-half of the premises, and the defendants Annie T. May and Julia C. Prall, who are his children, succeeded to his interest in the premises, and the defendant Sarah Eells has succeeded to the interest of Richard P. Eells.

From the time of the conveyance by the plaintiff of the interest of his child in the premises in May, 1864, they have been held and possessed by the defendants, and those through whom they claim, under a claim of absolute ownership, and large sums of money have been expended in improvements upon the said premises. Moreover, the plaintiff has himself hired the premises of the owners, and paid rent therefor, without any claim of title thereto or interest therein. Under these circumstances the plaintiff establishes no constructive possession of the premises involved, but the proof establishes an adverse possession against the plaintiff for more than twenty years, and a tacit acknowledgment of such possession by the plaintiff when he consented to become the tenant of such owners, and pay them rent without interposing any claim on his part of an interest in the property.

The exclusive possession of the property, and the hiring of the same to the plaintiff, and the demand of payment by him of the entire rent, were unequivocal acts, evincing an intention to hold the property hostile to the plaintiff and the world, and constituted an ouster in which he acquiesced.

The judgment appealed from should, therefore, be affirmed with costs.

PRATT, J., concurs ; BARNARD, P. J., not sitting.

JOSIAH M. FAVILL, Respondent, v. C. LAWRENCE PERKINS, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

Evidence. Agency.—Parol evidence of private instructions given by the defendant to his agent, not reported to the plaintiff, is inadmissible to vary a written contract.

Appeal from an order granting plaintiff a new trial.

Olin, Rives & Montgomery, for appellant.

Rufus O. Catlin, for respondent.

BARNARD, P. J.—The order setting aside the verdict of the jury ought to be affirmed on two grounds. Evidence was given tending to show an absolute contract to convey certain freight at a certain price. The contract was made by the shipping clerk of the defendant. It was finally reduced to writing and signed by the plaintiff. The defendant was permitted to prove that he told his clerk when the contract was shown to him to get an extension of time to deliver the freight until the 3d of September, 1887, the contract calling for a delivery in August, 1887, "If the vessel should arrive here, so that we could deliver the rails to him by September 3." There was no proof that the clerk ever reported the instructions to the plaintiff. It was not inserted in the paper, and the paper was without this condition being entered in it. The clerk was sent to make this contract, and he made it for the principals. An instruction given to him to make it conditional never communicated to the plaintiff and never agreed to by him was improperly received. The verdict was so entirely against the evidence as to call upon the court to set it aside. The agreement is in its terms absolute. It was not performed by the defendant. The plaintiff was damaged. There was not the slight-

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est proof that the agreement was in fact subject to a condition. There is proof tending to show that a breach of the contract by the defendant was occasioned by the fall in freight. The owners of the iron, by their manager, instructed the defendant that the contract was an option, and that as the iron did not arrive in time to deliver it to the plaintiff by the third of September, the option had expired, and he proposed to take advantage of the lower rate, except that he would allow the plaintiff five cents per pound higher than the market rate. If there was no condition, there was no option, and the reason assigned was only a pretense to break the contract.

The order setting aside the verdict should therefore be affirmed, with costs of the appeal.

PRATT, J., concurs.

OSCAR PURDY, Respondent, v. JOHN DINKLE, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

Appeal. From justice's court.—Where objections to the drawing and organizing of the jury in justice's court are merely technical, and do not involve or affect the merits, the county court, upon an appeal on questions of law only, may give judgment according to the right of the case, without regard to technical errors.

Appeal from a judgment of a county court, affirming a judgment recovered in justice's court.

Wm. H. H. Ely, for appellant.

James S. Millard, for respondent.

DYKMAN, J.—This is an appeal from a judgment of the county court affirming a judgment obtained by the plaintiff against the defendant upon a trial before a jury in a court of a justice of the peace.

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The appeal to the county court was on question of law only.

The action was for the recovery of commission on the sale of a horse, and there was ample testimony to sustain the verdict of the jury.

The appellant complains of irregularities in drawing and organizing the jury, but as the objections are merely technical and did not involve or affect the merits, the county court might give judgment according to the right of the case without regard to technical errors.

We, therefore, think the judgment of the county court should be affirmed, with costs.

All concur.

WILLIAM P. FIERO, Appellant, v. JAMES K. PAULDING *et al.*, Respondents.

Supreme Court, Second Department, General Term, June 28, 1889.

Reference. Compulsory.—An action for conversion is not referable by compulsion, and an answer setting up a defense, involving the examination of a long account, does not make it so.

Appeal from an order granting a reference under § 1018 of the Code of Civil Procedure.

L. C. & W. P. Platt, for appellant.

Martin J. Keogh, for respondents.

BARNARD, P. J.—The complaint is, in form, one for a conversion of personal property. The defendant had the plaintiff's brokers buy for the plaintiff certain stocks, and received payments thereon from them. The agreement between the parties was that the stock was to be held subject to the plaintiff's orders, without further payment, until

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a certain date, and before that date the defendant converted the stocks to their own use. The answer sets up a defense which, if proven, may involve the examination of a long account, but the character of the action is to be determined by the complaint. *Welsh v. Darragh*, 52 N. Y. 595.

It is an action for a conversion, and such an action is not to be referred compulsorily. *Camp v. Ingersoll*, 86 N. Y. 433.

If the action be not referable by compulsion, the answer cannot make it so. *Untermeyer v. Beinbauer*, 105 N. Y. 521; 8 N. Y. State Rep. 1.

The order should, therefore, be reversed, with ten dollars costs, besides disbursements.

PRATT, J, concurs ; DYKMAN J., not sitting.

JOHN W. FOULKES, Respondent, v. CHARLES H. FOULKES, *et al.*, Appellants.

Supreme Court, Second Department, General Term, June 28, 1880.

1. *Legacy. Action.*—In an action to recover a legacy, an allegation of a refusal to pay such legacy, without averring a demand therefor, is sufficient.
2. *Same.*—Nor is it necessary, in order to recover a legacy, to allege that a year has expired since letters were issued, where the executors are about to distribute it to other persons.
3. *Equity. Parties.*—The joining of an unnecessary party, in an equity action, does not render the complaint invalid.

Appeal from an interlocutory decree made at special term, overruling the demurrer interposed by one of the defendants.

This defendant demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action.

John Cummins, for appellants.

Opinion of the Court, by PRATT, J.

Goodrich, Deady & Goodrich, for respondent.

PRATT, J.—Various objections are made to the sufficiency of the complaint. It is said no allegation is made that plaintiff has demanded his legacy. It is alleged that the executors have refused to pay it to him; and a distinct refusal by them to pay may be sufficient to excuse him from making a formal demand.

It is objected that there is no allegation that a year has expired since letters were issued to the executor. The allegation is that the will was admitted to probate September 13, 1886, and the summons is dated in 1889. We think it may be inferred that letters were issued to the executors named in the will simultaneously with the probate.

Neither of these suggestions is of much importance in view of the allegation that there is in the hands of the executors \$16,000, to which plaintiff is entitled under the will, which the executors are about to distribute to other parties.

If that be true, the action would be maintainable without regard to the time that has elapsed since the issue of the letters. Plaintiff could not be required to lie by without action and see his money distributed to other parties, even if it be true that less than a year had elapsed since the issue of letters.

It is also objected that defendant, Charles H. Foulks, who demurs, is not a necessary party. If that be true it does not sustain the demurrer. The action is in equity and joining an unnecessary party does not render the complaint invalid.

Judgment affirmed, with costs.

DYKMAN, J. concurs; BARNARD, P. J. not sitting.

JOHN D. GIERHON, Appellant, v. THOMAS W. LUDLOW,
Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

Appeal. Dismissal of complaint.—In an action for malicious prosecution, the credibility of the testimony of defendant and his agent is a question for the jury, and it is error to dismiss the complaint, as matter of law, on their testimony; especially, where there is a denial by plaintiff of the offense with which he was charged, and also the undisputed fact that he was tried and acquitted on that charge.

Action was brought for malicious prosecution. The charge was made by an agent of defendant acting under his directions.

Appeal from a judgment dismissing the complaint.

Joseph F. Daly, for appellant.

Lewis L. Delafield, for respondent.

PRATT, J.—I think this case ought to have been submitted to the jury. The question whether or not there was probable cause for the complaint to the magistrate, did not rest upon that which the law views as undisputed testimony. The credibility of the personal testimony of the defendant was for the jury within well-established rules. The other testimony of defendant's witnesses came from persons who stood in such relations to him that their testimony was within the same rule. Besides that, there was a denial by the plaintiff that he had done the wrong alleged against him before the magistrate, and the undisputed fact that the plaintiff was tried on that charge and acquitted by the verdict of a jury. The testimony clearly shows that defendant was the real mover in this unfounded criminal prosecution. He retained the counsel who appeared against plaintiff before the magistrate, and instructed him to procure the war-

Opinion of the Court, by BARNARD, P. J.

rant. He attended at the trial, and seems to have been the person who was actually responsible for it. The complaint was not made by defendant personally, but by his agent, who acted under his direction, and on the advice of his counsel. He was clearly the real prosecutor.

The case is very close to the border line, but, on the whole, I think was within the rule which required its submission to the jury.

The plaintiff's exception to the learned trial judge's ruling dismissing the complaint should, therefore, be sustained, and a new trial should be ordered. It seems that, although the exceptions were regularly ordered to be heard in the first instance at the general term, another order absolute was also entered, dismissing the complaint on the merits. I do not understand that these orders were intended to be, or were, in fact, in conflict; or that the latter was intended to supersede the former. It will be safer, however, to reverse the latter order, to the end that full force and effect may be given to the former, and that should be accordingly done.

BARNARD, P. J., concurs; DYKMAN, J., not sitting.

EMILINE GALLUP, Respondent, v. JAMES HENDERSON
et al., Appellants.

Supreme Court, Second Department, General Term, June 28, 1889.

Attorney and client.—A deed given by an aged client to her lawyer, under an unjust and unequitable agreement, will be set aside.

Appeal from a judgment rendered in favor of the plaintiff.

BARNARD, P. J.—The general inference from the evidence in this case is very strong against the defendant Henderson. The plaintiff was nearly 80 years of age, and the

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first transaction between the parties was an agreement upon a foreclosure of a mortgage, whereby the defendant, who was the attorney, was to have all the property brought over \$3,000. The attorney claims to be entitled to over \$3,000 on this transaction. With the plaintiff's \$3,000 a bond and mortgage, given by Caroline J. Haddon, and owned by one Dennis, was assigned to plaintiff. Henderson claims to own this mortgage, also, and that the reason why the title was taken to the plaintiff was that Haddon's wife was his niece. Subsequently to the taking of the mortgage, and in May, 1884, the defendant's wife bought a tax-title apparently superior to the mortgage, a lease for 1,000 years. In April, 1885, the foreclosure suit was commenced in plaintiff's name. The defendant Henderson was the attorney, and his then partner was attorney for his wife, and she set up a superior title; the tax lease and the property were sold subject to it. Then a deed was given to plaintiff and Mrs. Henderson by the referee, and the condition of sale was subject to the tax sale. The defendant Henderson endeavored to get the referee's deed made out to the two ladies in joint tenancy. It was also part of the defendant's case that the defendant Henderson had an agreement with the plaintiff to pay \$1,000 a year for legal services to be rendered. The plaintiff denies the agreement on the foreclosure. She denies that the Haddon mortgage was held by her for Henderson. She denied the \$1,000 a year.

The trial judge properly found against the defendants. The plaintiff was very old. The defendant was her lawyer, and they lived together. The transaction is so inequitable that, as between strangers, such a finding would be justified.

The judgment should therefore be affirmed, with costs.

PRATT, J., concurs ; DYKMAN, J., not sitting.

Opinion of the Court, by BARNARD, P. J.

EMILINE GALLUP, Respondent, v. JAMES HENDERSON
et al., Appellants.

Supreme Court, Second Department, General Term, June 28, 1889.

New trial. Newly discovered evidence.—Newly discovered evidence, which will not affect the result of the first trial, does not furnish ground for the granting of a new trial.

Appeal from an order denying a motion for a new trial on the ground of newly discovered evidence.

S. Jones, for appellant.

N. Cothran (Brewster Kissam of counsel), for respondent.

BARNARD, P. J.—The motion for a new trial is based upon a claim that the defendants have discovered evidence since the trial which is material, and upon which a different result will be likely. The evidence consists of two witnesses. One is Andrew J. Cripsey. The action is brought to set aside a reformed deed, and the plaintiff's case was tried upon the theory that it was her mortgage which was foreclosed, and that she should have had the deed. It was claimed by the defendant that the mortgage was really his, and that the plaintiff only nominally held the title. Cripsey's affidavit is entirely at war with this claim. He stated that he met the parties on the ferry boat after the sale, and that the plaintiff said: "She was glad that she and Mrs. Henderson had made the purchase, and that she hoped it would turn out to be a good investment." What had she to do with it if Mr. Henderson testified truly on the trial that she held the title for him. The affidavit of Butcher is equally unsatisfactory. He says he overheard a conversation in an adjoining room, he being an inmate of defendant's office. That one Brown advised Henderson to accept the plaintiff's proposition, "in case the debts did not warrant the payment of too much money."

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Statement of the Case.

He heard plaintiff say in presence of Nash, in discussing the matter with the same memoranda book which was present at the Brown interview, that Mrs. Gallup said she would give the defendant all over the \$3,000.

That she was satisfied that Henderson should take in case of her death any property she left rather than her husband or relations should get it. Henderson replied that would give all the money she wanted. This interview was to the effect further that Henderson would guarantee the \$3,000.

If a new trial should be granted no different result could be expected with this new evidence, in view of the relationship of the party, and of the hard and inconceivable motive of the contract itself. There is no question, but that the plaintiff tells the exact truth about the dealings of the parties. The claim to her was always apparently honorable, and any deviations in the papers, therefore, were for ultimate purpose of which she was not designed to be cognizant.

Order affirmed, with costs and disbursements.

PRATT, J., concurs ; DYKMAN, J., not sitting.

THE FULTON BANK OF BROOKLYN, Appellant, v. HERBERT
D. CHASE *et al.*, Respondents.

Supreme Court, Second Department, General Term, June 28, 1889.

Interpleader.—Where the plaintiff sold securities placed with it to secure a loan and realized from said sale more than was due on the loan, and various parties, who claimed portions of the securities brought their several actions against plaintiff for conversion, an action by plaintiff to restrain such actions against it and cause the plaintiffs therein to interplead cannot be maintained.

The plaintiff, in January, 1885, loaned to one George K. Chase the sum of \$40,000 upon a collateral stock note, signed

by Herbert D. Chase, one of the defendants, and upon the securities therein mentioned.

Portions of these securities were, from time to time, surrendered, and the plaintiff either received payments on account of said loan, or accepted other securities as collateral in place of those surrendered.

The plaintiff, about August, 1887, began demanding payment of the loan, which was not complied with, and it advertised the collateral for sale. The borrower died Sept. 29, 1887; and on Oct. 19, 1887, the securities were sold, producing to the plaintiff a surplus of \$3,157.07 over the amount claimed by it.

Various parties who claim to be owners of the securities commenced actions against the plaintiff for conversion.

The executors of the borrower, on March 16, 1888, served upon the plaintiff notice that they claimed ownership of said sum of \$3,157.07, above mentioned, and interest.

On March 23, 1888, the bank commenced this action against all said claimants to have the title to this sum of \$3,157.07 determined, praying judgment "that each of said defendants may be restrained by injunction from taking any proceedings against the plaintiff in relation thereto;"

"that they may be required to interplead together concerning their claims to said sum of \$3,157.07;"

"that this plaintiff may be authorized to pay the said sum of \$3,157.07 into court, by depositing the same under the order and direction of this court, with such depositary as this court may direct;"

"that upon so depositing the same in compliance with such order, the plaintiff be discharged from all liability to either of said defendants in relation thereto."

Bergen & Dykman, for appellant.

F. & C. A. H. Bartlett, for respondents.

PRATT, J.—The judgment appealed from is clearly cor-

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rect. The claims of the various parties against the bank are separate and distinct; each depends on its own circumstances, and they have no inherent connection with each other.

If the bank has no legal right to use the stock of Meyer, and by such use incurred a liability to the owner of the stock, the action already brought by the party claiming to be injured is the most convenient means to determine the question. If the bank had such authority, it will prevail in the action. If it had not, the court cannot afford any relief, and it must respond for such damage as it has inflicted.

There is no propriety in the claimants, under the Meyer transaction, being hampered by matters with which they have no concern. The same may be said of each of the other claimants. Their rights depend upon alleged unauthorized dealings of the bank with securities now claimed to be owned by the various plaintiffs. And the limit of their recovery, if they sustain that claim, does not depend upon the amount realized by the bank.

When those claims are disposed of, if the bank prevails and shall still have in its possession a fund it cannot conscientiously keep, an application to pay it into court might be entertained. But the court cannot now grant such permission upon the terms asked, viz., that the bank be protected against all the claimants.

Judgment affirmed with costs.

All concur.

Opinion of the Court, by PRATT, J.

CORNELIUS D. GUYON *et al.*, Appellants, v. JOHN ROONEY,
Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Justice's court. Replevin.*—An action to recover a chattel may be maintained in justice's court, though the constable has made no return to the requisition of the justice of the peace.
2. *Appeal. Certification.*—An appeal from an inferior court to the general term will not be determined, unless the appeal papers are certified, as required by § 1353 of the Code of Civil Procedure.

Appeal from the judgment of the county court.

W. J. Powers, for appellants.

William M. Mullen, for respondent.

PRATT, J.—This is an appeal from a judgment of the county court of Richmond county reversing a judgment entered by a justice of the peace, in an action commenced in his court by summons in an action for the recovery of the possession of a horse, and damages for the detention thereof. The justice's return shows that he issued a summons August 8th, 1887, returnable August 15th, 1887, and that the plaintiff, at the same time, made an affidavit before the justice entitled in the action, setting forth his ownership of the horse; that it was wrongfully detained by the defendant; that defendant claimed to hold it by virtue of a chattel mortgage executed by plaintiffs to one Imlay and others; that the horse had not been taken by warrant for the collection of a tax, assessment or fine, or on execution or warrant of attachment against plaintiff, or any person from or through whom plaintiff derived title, and that the value of the horse was \$190. The return shows no requisition in the justice's court, or return thereof. The summons was personally served.

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On the return of the summons, the plaintiff made a formal written complaint by his attorney, setting forth his ownership of the horse, the wrongful taking and detention thereof, its value, and \$100 damages, and asked for judgment for the delivery of the property and for the recovery of the damages, with costs.

Defendant appeared and interposed an answer to the merits, and plead the want of a return to the requisition by the constable predicated thereon an objection to jurisdiction of the justice. Thereupon the justice tried the case on the merits, and for aught that we can see, so far as the merits extend, entered a judgment in plaintiff's favor for the delivery of the horse and for fifty dollars' damages with \$3.15 costs, on sufficient evidence.

Defendant appealed to the county court and demanded a new trial. On the new trial before the county court defendant moved to dismiss the action for the alleged want of jurisdiction, and the court granted his motion, and, without farther proceedings, entered judgment, reversing the justice's judgment, and dismissed the action with \$74.14 costs. The plaintiff then appealed to this court.

Section 2933 of the Code would seem to apply to and control this case. It provides that "Where the summons has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied, or the constable has not been able to replevy it." This provision indicates that an action to recover a chattel may be maintained in a justice's court where there has been no requisition. The returns showed no requisition. There was an affidavit appropriate for such a requisition, but for aught that appears, the precise event happened which brings the case within section 2933. The plaintiff did not require the chattel to be replevied. *Delin v. Stohl* (2 Civ. Pro. Rep. 222) sustains this view. The form of the justice's judgment was probably wrong, but there can be no

doubt, in view of this provision of section 2933, that the justice's court had jurisdiction of the parties and the subject-matter of the action. It follows that the motion to dismiss the action in the county court was erroneously granted. That court should have tried the action on the merits, because the amount claimed by plaintiff in his complaint exceeded fifty dollars. Code, § 3068.

The foregoing was written before we observed the point about the certificate of the appeal papers. It is now insisted that we cannot determine this appeal because the papers before us do not appear to have been certified as required by section 1353. We agree with the first department in *Lewisohn v. Niederwiesen* (40 Hun, 545; 1 N. Y. State Rep. 72) that this rule is an important one, especially in cases which come into this court from an inferior court. There is nothing before us to show our jurisdiction. But, since we have expressed our views on the merits of the appeal, it may save future trouble and expense to the parties if they shall be made known. We therefore decline to make formal decision of this appeal at this time. The plaintiff may have a stay until next general term or withdraw his appeal in order to obtain proper certification for the next general term, and thus have papers properly certified for submission.

All concur.

ELLEN HANSON, Respondent, v. WALTER M. AIKMAN,
Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

New trial. Excessive damages.—A verdict is excessive, where damages are given in part for injuries not caused by the accident.

Appeal from a judgment entered upon a verdict in favor of the plaintiff, and from an order denying a motion for a new trial upon the minutes.

J. Stewart Ross, for appellant.

Charles J. Patterson, for respondent.

PRATT, J.—There is no dispute that plaintiff stepped into a coal hole in front of defendant's house, and for whatever injury she then sustained she has a right of action. It is the extent of those injuries that is chiefly in doubt.

The surgeon who attended plaintiff a few hours after the accident found contusion and bruises on the limbs, thighs and pelvis, but found no other injury except the shock. He does not seem to have found the injuries severe, and made but two calls.

Plaintiff did not seek any further medical attention, either from private practitioners or at any dispensary or hospital. She testifies that she kept her room for three weeks, and was not able to do her work for three months. Her neighbors, some occupying the same house, do not seem to have heard of the accident or to have observed any of the alleged results.

Nineteen months afterwards she was delivered of a child, at full term, and some weeks after that event she seems to have needed and received the care of a physician for the first time after the accident. He testifies that he found her

suffering from an inflammation of the bowels and enlargement, inflammation and displacement of the left ovary ; and that upon hearing the history of her stepping in the coal hole nineteen months before, he attributed her condition to that accident, "as there was no other exciting cause at the time." But, as she had been recently exposed to the perils of child-birth, in which the doctor was not her medical attendant, his testimony that there was no other exciting cause can be only the expression of an opinion ; and in view of the fact that Dr. Eccles, who first examined plaintiff, found no evidence of such ovarian trouble, and that it did not so develop itself during the period of pregnancy as to require attention, it seems more reasonable to believe it a result of child-birth. It appears by the testimony of one of plaintiff's medical witnesses that inflammation of the pelvic parts after child-birth is usually caused by some septic poison from external sources, and that such inflammation is liable to cause displacement of the ovaries ; and as we find nothing in the evidence indicating such displacement before the birth of the child, in October, 1886, we think it must be regarded as reasonably certain that it did not earlier exist.

It may be remarked that the complaint is silent as to any such injury, nor does the plaintiff, in her examination before trial, refer to it, except vaguely as a swelling in the groin.

We have not yet alluded to the medical testimony introduced by defendant. If it be the fact that displacement of the ovary forbids a full term pregnancy, that would be decisive against the present claim that such displacement was caused by the accident of March 4, 1885. But without going to that extent it seems unlikely that the serious situation now testified to existed before the child-birth, for the attending adhesions would be apt so to interfere with the change incident to pregnancy, and to cause such discomfort as to suggest professional atten-

Opinion of the Court, by PRATT, J.

tion, which would have disclosed the cause of the trouble. Would not the weight of the child, in the later months, have caused disagreeable symptoms? Of these there is no mention.

Upon the whole evidence it seems reasonably clear that after the passing away of such results of the accident as were discovered by Dr. Eccles, the plaintiff was in her usual health till after the birth of her child, and that exposure to cold, the absorption of septic material or some injury during delivery, brought on the inflammation and suppuration which produced the adhesions which caused the ills from which the plaintiff now seems to suffer.

Plaintiff (at folio 357) says that the pain she now experiences arose shortly after the birth. Before that time she had never found any bad result from lifting her children, hanging out clothes or other like exertion.

If we are correct in our views of the testimony, it follows that most of the evils testified to by the plaintiff were not caused by the accident, and that the verdict is excessive. Ordinarily, in such a case, a new trial will be granted, but as the plaintiff has suffered some injury, she may retain \$500 of the verdict if she elects to remit the excess above that sum.

If such reduction is made, the judgment will be affirmed, without costs of appeal. If the plaintiff does not so elect, the verdict will be set aside, with costs to abide the event.

Opinion of the Court, by PRATT, J.

CHRISTIEN KUMMEL, Respondent, v. THE GERMANIA
SAVINGS BANK, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

Savings bank.—Where a savings bank contracts to make no payment, unless the depositor calls for the same in person, or by attorney duly constituted, it is liable for all moneys paid to third persons out of such deposit, without such authority, though the contract contains a subsequent provision that the bank shall not be held liable for any fraud committed by producing a bank book.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

William D. Veeder, for appellant.

Hirst & Rasquin, for respondent.

PRATT, J.—The case in 57 N. Y. 423, is not in point. There the contract between the parties provided that any payments made to persons presenting the deposit books should be valid payments to the depositors.

In the case at bar the contract provides that no payment should be made unless the depositor call for the same in person, or by attorney duly constituted, by writing signed and acknowledged.

It might well be supposed that the contract was drawn in view of the decision in 57 N. Y. to give confidence to depositors that their money would be safe, and forthcoming when demanded.

Upon the terms of the contract, it is not easy to see why plaintiff was not entitled to a more favorable direction to the jury than he in fact received. For no claim was made that plaintiff had executed any written order for payment, and if he did not himself receive the disputed payments their invalidity seems clear.

Statement of the Case.

If it be argued that the subsequent provision in the contract is to the effect that the bank will not be liable for any fraud committed by producing the bank book, it may be answered that if the provisions are inconsistent the prior provision must stand, and the later one be rejected. 2 Parsons on Contracts cited; Neudecker v. Kohlberg, 3 Daly, 407.

It should be also said that judgment given below does not in any just sense hold defendants liable for a fraud committed by a depositor. The liability to which they were held is to pay money they received from plaintiff, and for which they had not discharged themselves by a payment authorized by their contract.

Judgment affirmed, with costs.

All concur.

CHARLES F. JOHNSON, Respondent, v. BROADWAY &
SEVENTH AVE. R. R. Co. Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Evidence. Physician.*—In an action for personal injuries, the admission of testimony of a physician as to whether the plaintiff can walk without a cane, is within the discretion of the trial court, especially under a general objection.
2. *Same. Expert.*—Testimony of an expert witness, as to whether plaintiff will recover, is proper.
3. *Same. Leading questions.*—Leading questions are always discretionary.
4. *Trial. Charge.*—A refusal to charge that there is no evidence to justify any allowance for future damages, or for permanent disability, is not error, where there is testimony that plaintiff cannot recover from his injuries.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

Root & Clark, for appellant.

J. Edw. Swanstrom, for respondent.

Opinion of the Court, by PRATT, J.

PRATT, J.—Plaintiff was injured while alighting from defendant's car, in which he was a passenger.

There was a conflict of testimony on the trial as to whether the injuries were caused by the sudden starting of the car, after it had been stopped at plaintiff's request, and while he was in the act of alighting therefrom, or whether they were the result of plaintiff's attempt to alight from the car while it was in motion and before it had been stopped. That question was properly left to the jury.

We are unable to see that any error was committed on the trial. The exception which the appellant now seeks to sustain on the ground that the question was leading, was taken under a general objection to the question, without specifying any ground. It would have been in the discretion of the court to allow the question, even if it had been objected to on the ground that it was leading.

The question was properly allowed. The witness Dr. Lumbeck had testified that he had been a physician and surgeon for eighteen years; that he examined plaintiff with respect to his condition, and found him partially paralyzed in the lower part of the spine and left side, and his left leg and arm in a partial state of paralysis; that there was a defective sensitiveness in the small of the back, the left leg and left arm; and that those conditions made him half useless or half powerless and perceptibly lame. Ample foundation for the question has thus been laid.

Nor was there any error in the refusal of the court to charge as requested. Dr. Lumbeck had testified that, in his opinion, from the examination he had made of plaintiff, he would not recover from his injuries. That testimony was positive as to plaintiff's injuries.

The judgment and order appealed from should be affirmed, with costs.

DYKMAN, J., concurs.

Concurring opinion, by BARNARD, P. J.

BARNARD, P. J. (concurring).—The evidence shows that the defendants failed to give the plaintiff, who was a passenger, time to get off from the car when he arrived at the end of his journey. The conductor stopped the car, and before the plaintiff could put his foot upon the ground, and while he was upon the step of the back platform, in the act of stepping off, the car gave a jump forward and threw the plaintiff at full length upon the street. The injury was very severe. A partial paralysis of the left side of the plaintiff resulted. The accident happened in September, 1887, and the plaintiff could do no work until March, 1888. Since then he could not do the same work, and his injuries caused him a loss of twenty-five dollars per week up to the time of trial in January, 1889. Since plaintiff has been at work, he has constant pain in his side, and cannot bend to the floor and lift heavy things up, and suffers from sleeplessness.

There was proof given tending to show that the partial paralysis continued, and that the plaintiff is, to a certain extent, lame, and that he will never recover. Three objections were taken on the trial. A direct question was asked by the plaintiff's counsel of the physician, whether the plaintiff could walk without a cane. A general objection was taken and the answer permitted. Leading questions are always discretionary, and this one certainly did no harm. The fact was proven as to the paralysis of the left side, and that one side was useless. The witness did not answer the question further than to say that the paralysis made a perceptible lameness. The physician was asked whether, in his opinion, the plaintiff would recover. The question is a proper one. The witness had been a surgeon for eighteen years and was qualified to give an opinion as to the result of the injury, whether curable or not.

If this proof were proper, then it was not error to permit the jury to consider how far the plaintiff was disabled, and to consider that in arriving at a verdict.

Opinion of the Court, by PRATT, J.

No other exceptions are presented as a reason for a new trial.

The judgment should therefore be affirmed, with costs.

AMBROSE LEE *et al.*, Respondents, v. JOHN T. BRIGGS,
Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Contract. Performance.*—Where the memorandum of sale of real property states that the deed was to be given at any time on payment of \$1,000 by plaintiffs, the time can be made certain by defendants' tendering a deed and demanding payment of the purchase money.
2. *Evidence. Contract.*—Any uncertainty in a contract in the description of the property therein to be conveyed can be remedied by parol evidence.

Appeal from a judgment for the specific performance of a contract for the conveyance of real estate.

Miller & Phillips, for appellant.

Martin J. Keogh, for respondents.

PRATT, J.—This is an action to compel the specific performance on the part of the defendant, of the following contract:

JEROME, N. Y., *July 11, 1884.*

Memoranda.

Agreement made this day between Ambrose Lee and Elizabeth S. Lee, first part, and John T. Briggs, second part, to purchase house and lots (Nos. 17 to 23) here for \$5,000—the latter, John T. Briggs, to give deed for same at any time, on payment of \$1,000 or more by the former, Ambrose Lee and Elizabeth S. Lee; balance to remain on bond and mortgage at six per cent for one or more years, at option of said Ambrose Lee; fifty dollars to be paid by Ambrose Lee and Elizabeth S. Lee for the new fence. In the

Opinion of the Court, by PRATT, J.

meantime, interest to be paid by Ambrose Lee and Elizabeth S. Lee at six per cent, as follows: Twenty dollars monthly, and all taxes on the property, to John T. Briggs.

AMBROSE LEE,
ELIZABETH S. LEE,
J. T. BRIGGS.

The trial court has found, upon ample proof, that the parties executed the agreement, and that, in pursuance thereof the plaintiff entered into possession and duly kept and performed upon his part all the stipulations therein contained. The execution of the agreement and what has been done since, were matters of fact, and the findings of the judge below seem to be fully sustained by the evidence.

The defendant objects to the agreement as uncertain, as void for want of mutuality, and that it would be inequitable to enforce it.

The main point as to uncertainty is based upon the expression that the deed was to be given at any time on payment by plaintiffs of \$1,000. This will not avail them when it is considered that the plaintiff continued to pay the taxes upon the property and interest upon the purchase price. The time could be made certain by the defendant tendering a deed and demanding the \$1,000. As to the uncertainty of the description of the property, it was proper to show what the property was by parol evidence, and that was also rendered certain by the plaintiff entering into possession of a properly defined and described piece of property as appears by the pleadings.

The question to be determined at the trial was whether there existed a contract between the plaintiff and defendant sufficient in law, and which equity ought to enforce.

It was not whether the contract standing alone was sufficient to warrant a judgment of specific performance, but whether, under all the facts and circumstances appearing upon the trial, such a judgment ought to be rendered.

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Considering all the negotiations, the fact of possession by the plaintiff and his making improvements upon the property and payment of taxes, it would have been a fraud upon the plaintiff to permit the defendant to refuse performance of his part of the contract.

The judgment must be affirmed, with costs.

BARNARD, P. J., concurs; DYKMAN, J., not sitting.

THOMAS W. LUDLOW *et al.*, as Executors, etc., Appellants, v.
JOHN D. GIERHON, Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

Questions of fact. Easement.—Where defendant had contracted with the city of Yonkers to construct a sewer upon land owned by plaintiff, who had granted an easement therein to the city for such purpose, and the right of temporarily using the adjoining dock surface for the deposit of materials during its construction, the reasonableness of defendant's act, as the instrument of the city in using this dock surface for deposit of materials, is a question for the jury, if there is a conflict of evidence.

Appeal from a judgment of the city court of Yonkers entered upon a verdict, and from an order denying a motion to set aside the verdict and for a new trial.

William W. Scrugham, for appellants.

Joseph F. Daly, for respondent.

PRATT, J.—We think this judgment should be affirmed, for reasons appearing in the charge of the learned trial judge to the jury. There was evidence tending to show that plaintiffs, or one of them, consented to the use of their land for temporary deposit of material excavated in constructing the sewer. True, there was some evidence tending to show that the consent was withdrawn. But the case

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was not so clearly with plaintiffs on this point as to justify the direction of a verdict in their favor. But there is, in our opinion, a deeper difficulty with the plaintiff's case. Defendant had contracted with the city of Yonkers to construct a certain sewer upon land owned by plaintiffs, they having granted an easement therein to the city for that purpose. The sewer itself was to be constructed within a certain strip which is particularly described. But the grant contains this additional privilege :

“ And, also, the right of temporarily using the adjoining dock surface owned by the parties of the first part for the deposit of materials during the construction of such public sewer.” Then follows a further provision that, “ the exclusive use or purpose to which the described premises shall be applied by the party of the second part * * * shall be the construction, maintenance and use of a public sewer therein, and whatever shall be incident thereto as aforesaid.” The “ above-described premises ” do not consist of that strip alone. That strip was for the sewer itself. The other part of the grant—the right to the temporary use of the adjoining dock surface—was a part of the premises or subject-matter of the grant—and for aught that we can see, the city had quite as perfect a right to the exclusive temporary use of that adjoining dock surface for reasonable deposit of materials in the construction and maintenance of the sewer as it had to the exclusive permanent use of the strip for the sewer itself.

That use was an incident in the construction and maintenance of the sewer. Hence, as the learned trial judge put it to the jury, the question was the reasonableness of the defendant's act as the instrument of the city in using this dock surface for deposit of materials. That was plainly a question of fact for the jury arising on a conflict of evidence. The verdict is, therefore, conclusive on that issue.

The judgment must be affirmed, with costs.

All concur.

In the Matter of the Final Judicial Settlement of the
Account of BENJAMIN LARAMIE, Administrator, etc.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Executors. Final accounting.*—The amount paid by the administrator to his attorney for obtaining the money which constitutes the whole estate, if a reasonable sum, should be allowed to him, on the final settlement of his accounts.
2. *Same. Power of surrogate.*—The power to determine who are the proper distributees is inherent to the power to settle, account and distribute the estate; and in such case, the surrogate's court has power to determine the question of the legitimacy of the distributees.
3. *Same. Costs.*—Where, on such settlement, a contest between a legitimate child, and other alleged illegitimate children, of the decedent, was set in motion by the administrator, who, in good faith, presented the question to the surrogate's court, the costs of a special guardian appointed for all the children, and of the attorney for the legitimate child, should not be charged against the administrator's share in the estate, but should be paid out of the share of the legitimate child.

Appeal by the administrator from a decree settling his accounts, and charging him personally with costs.

W. Charles B. Thornton, for appellant.

Francis Spier, Jr., for Mr. O. Ball and Rufus B. Laramie, respondents.

BARNARD, P. J.—The case shows that Benjamin Laramie was appointed by the surrogate of Kings county administrator of the estate of Harriet M. A. Laramie, his wife. The administrator petitioned for a judicial settlement of his account.

By his petition the administrator stated that certain infants were among those interested in the estate.

These infants were cited to appear at the accounting, and subsequently to the return of the citation the surrogate appointed a special guardian for them, to take care of their

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interests, on the final settlement. Objections were taken to the account and the proceedings were referred to John A. Kemble, referee, to hear and determine all matters arising upon the settlement of the account. Among the items contested was a payment of \$250 by the administrator to his attorney. The evidence shows that the administrator agreed, with his attorney, to pay \$250 for obtaining the money from England, which constituted all the estate.

It was a legacy due to the deceased and amounted to \$633.99, and was from the estate of Elizabeth Weeks. The evidence shows that \$250 was a reasonable charge for the work done, and that sum should have been allowed by the referee.

The only other question litigated on the trial was whether the young children were distributees.

Laramie was married to the deceased, and by her he had children, one of whom, Rufus B. Laramie, alone survives. In 1861, Benjamin Laramie enlisted first in the army and then in the navy. On his return he found his wife had one young child by him, and these disputed children.

The referee has found them illegitimate. The objection is taken that the legitimacy of the children exceeds the power of the surrogate's court.

The point does not seem to be well founded. The power to determine who are the proper distributees is inherent to the power to settle and account and distribute the estate. It is, also held to exist by adjudged cases. *Riggs v. Cragg*, 89 N. Y. 479; *Purdy v. Hayt*, 92 Id. 446; *Matter of Verplanck*, 91 Id. 439.

There is nothing in the evidence which shows that the costs of the special guardian or of the attorney for the legitimate child should be charged against the husband's share, as he was left to pay his own costs.

The special guardian, who was as well the special guardian of the legitimate child, as of the illegitimate children, should equally be paid out of the share of the legitimate

child. The contest was between these children, and there is no proof showing bad faith or unreasonable contest upon the part of the husband of the deceased. He presented the question to the surrogate's court and that is all.

The contest was taken up by the child against his illegitimate brothers and sisters. The husband did nothing but call for payment of the cost of this contest.

Decree modified in accordance with these views and no costs allowed to either party, on this appeal.

All concur.

In the Matter of the Accounting of PHILIP R. UNDERHILL, Executor, etc., of ELIZABETH R. UNDERHILL, Deceased.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Surrogate. Power.*—A surrogate has power to vacate orders which his court had no power to make.
2. *Same.*—But he has no power upon the accounting beyond settling the accounts; he cannot order a legatee to repay to the executor an overpayment of legacy.

Appeal from an order of the surrogate's court, vacating a part of its decree.

Townsend, Dyett & Einstein, for appellant.

Alexander Thain, for respondent.

BARNARD, P. J.—Philip R. Underhill, the executor of Elizabeth R. Underhill, accounted before the surrogate of Westchester county. By the terms of the will of the deceased Elizabeth M. Guyon was entitled to a life estate in a share of the net income. The surrogate, in the decree then made, adjudged that Mrs. Guyon had been overpaid

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\$3,953.35, and further adjudged that she repay the said sum to the executor. The decree was made in November, 1882. Mrs. Guyon died in December, 1883, and her executor applied to vacate that part of the decree which adjudged Mrs. Guyon to repay the overpayment to the executor. The surrogate granted the motion, and vacated the decree so far as it affected this overpayment to Mrs. Guyon. The order was rightly made. A surrogate has power to vacate orders which his court had no power to make. *Vredenburg v. Calf* (9 Paige, 128). The power to correct judgments in proper cases is inherent to courts of justice. *Ladd v. Stevenson* (112 N. Y. 325; 20 N. Y. State Rep. 746).

The surrogate had no power upon the accounting beyond settling the accounts. The court established the assets and payments for and on the estate. An unauthorized payment had no place in the account. That was a private matter between the executor and the person to whom the payment had been made, and enforceable as such by action. The surrogate could issue no execution to enforce the expunged parts of this decree. The surrogate had no power to adjudge anything but the fact, whether Mrs. Guyon had been paid her life estate interest up to the time of the accounting, and when this was done, the distribution could proceed.

The order should be affirmed, with costs.

PRATT, J. concurs; DYKMAN, J., not sitting.

WALTER M. McKINNEY, Respondent, v. THE LONG ISLAND
RAILROAD CO., Appellant.

Supreme Court, Second Department, General Term, June 20, 1889.

1. *Evidence. Negligence.*—In an action on the ground of negligence for injuries sustained by reason of being struck by defendant's train, while plaintiff's foot was caught and held between one of the rails and a guard rail, the plaintiff may show how the track and guard rail were constructed at the place of the accident, and the construction of other guard rails, so that the jury can determine whether the guard rail at the place of the accident was properly constructed.
2. *Trial. Juror.*—Where a juror states that, notwithstanding his sympathies, he can render an impartial verdict upon the evidence, he stands upon the extreme verge of competency.
3. *Appeal.*—After three juries have failed to agree for the defendant, but the last one has agreed, in favor of the plaintiff, the verdict must stand, unless the appellant court usurps the province of the jury and holds that the plaintiff's witnesses are not worthy of credit.

Appeal from a judgment entered upon a verdict.

Hinsdale & Sprague, for appellant.

John S. Griffith (*J. Stewart Ross* of counsel), for respondent.

PRATT, J.—This case has now been tried four times before a jury, on three of which occasions the jury disagreed. It is conceded to involve issues of fact, but the evidence is utterly irreconcilable as to the circumstances surrounding the accident.

It is probable that plaintiff and his companion, boy-like, inserted their feet in the space between the two rails for an experiment and then became frightened at the approach of the train and became caught and failed to extricate themselves in time.

There is no merit in any of the exceptions taken at the trial.

Statement of the Case.

It was proper for the plaintiff to show how the track and guard rail were constructed at the place of the accident, and, also, to show how other guard rails are constructed in order that the jury might determine whether at this place the same was constructed in the usual or proper manner.

The challenge to the juror Dorrien was properly overruled. The juror stated that notwithstanding his sympathies, he could render an impartial verdict upon the evidence. The juror stood on the extreme limit of competency, but we are unable to say under the cases that he was so affected by any bias as to render him incompetent to serve.

Three jurors have failed to agree for the defendant and the last has agreed for the plaintiff. Such verdict must stand, unless this court usurps the province of the jury and holds that the plaintiff's witnesses are not worthy of credit. Assuming even that the boys put themselves in this position of peril, it then was a question of fact whether the defendant used reasonable care not to run over them.

On the whole case we feel constrained to affirm the judgment.

All concur.

In the Matter of the Will of GEORGE R. JACOTT, Deceased.

Supreme Court, Second Department, General Term, June 23, 1889.

1. *Wills. Appeal.*—The general term, on reversing a decree admitting a will to probate, must enter an order requiring the submission of the questions of fact to the jury.
2. *Same.*—In such case, the questions of law are for the court, and the questions of fact ought to be submitted to the jury.
3. *Same. Questions of fact.*—Where issues of fact have been settled by an order of the general term, on reversing a decree of the surrogate admitting a will to probate, in reference to the execution of the will, testamentary capacity and undue influence, the case, where the evi-

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dence is conflicting on these points, involves questions of fact for the jury.

4. *Same. Void.*—Where the testator is ignorant of the effect of a clause in his will, designed and contrived to save a legacy in case of his death within the time which would invalidate the legacy, the instrument is not an expression of his will.
5. *Same. Charitable bequest.*—And the fact that the will was read over, clause by clause, to the testator, does not affect a determination on a former appeal, that he was ignorant that a charitable bequest there in contained, would become void in case of his death within two months.
6. *Evidence. Hypothetical.*—Professional witnesses, on hypothetical questions, are permitted to testify to their opinions as to the mental condition of the testator, and his capacity to concentrate his thoughts on matters of business, to resist importunity, and generally to overcome influence.
7. *Same. Declaration of trust.*—A declaration of trust, made long subsequently to the will, is incompetent.

Appeal by a contestant from a decree of the surrogate admitting a will to probate, on which appeal said contestant seeks to bring up for review an order entered in the supreme court, denying a motion made by her for a new trial on the minutes and exceptions, and to set aside the verdict of the jury.

Albert Bach (*John L. Hill* and *Albert Bach*, of counsel), for appellant.

Edward S. Odell (*Almet F. Jenks*, of counsel), for respondents.

PRATT, J.—At a former general term we reviewed the testimony upon which the surrogate admitted this will to probate, and reversed his decree, on questions of fact. It, thereupon, became our duty to enter an order requiring the submission of the questions of fact to a jury. The Code is mandatory in this respect (Code, § 2588; *Sutton v. Ray*, 72 N. Y. 482)—and we obeyed that rule. Issues of fact were settled by that order in reference to the execution of the will, testamentary capacity and undue influence.

The case, therefore, under this order for a jury trial,

stood, in most respects, as if the questions of fact had arisen in an action in which the contestant had the right to a jury trial as matter of law. When reviewed from this standpoint the course of procedure would have been very simple. Under this order the circuit court and jury were together bound to do just what the surrogate was bound to do in the first instance,—to make due inquiry into all the facts and circumstances tending the execution of this paper (Code, § 2622), the capacity of the decedent, and his freedom from restraint and undue influence. The questions of law were for the court and the questions of fact, whatever they were, ought to have been submitted to the jury.

A few suggestions will suffice to show that the case involved questions of fact for the jury. There was, first, the question of testamentary capacity,—a question which necessarily rests very largely upon the opinions of the subscribing witnesses. Opinions are rarely, if ever, conclusive upon the jury in jury cases. 1 Wharton on Evi., § 455. Then, second, on the formalities of the execution of this paper, the witness Washburn, who was the only one who was not in some way related to some of the parties or legatees, was unable to testify to one of the statutory requisites,—the decedent's request, either directly or indirectly, that he should become a subscribing witness. This essential fact, therefore, was not proven, except as the other two witnesses testified to it. Looking at their relations, we find the following: Marshall was a vestryman of the church, which, under this alleged will, was to get a legacy of \$10,000 out of the \$16,000, which constituted the entire estate. And besides that, his daughter was a legatee. In addition to that it is obvious that he had been a busy partizan in striving to procure and sustain the will. The evidence shows that decedent was not inclined to make a will at all.

It seems that this witness was active in procuring the decedent to make a will, and told him if he made no will his property would go to the state, and his friends would have

to bury him. So, too, the evidence showed that the witness had been very busy in efforts to sustain proponent's contentions before the surrogate.

Dr. Simmons, the family physician, who had testified before the surrogate that decedent's physical condition and suffering was such that he was unable to concentrate his thoughts upon any matter of business, here testified that Marshall came to him and endeavored to persuade him to change his testimony before the surrogate. The contestant showed such a state of bias on Marshall's part that his credibility was a proper subject for the consideration of the jury.

The draughtsman of the will was another subscribing witness. He was a nephew of one of the residuary legatees, who, if the legacy of \$10,000 to the church failed for any cause, would take that sum. The evidence very strongly tended to show that this legatee had done acts which were at least susceptible of an inference of undue influence and contrivance to obtain this document for his own advantage. Decedent was living alone in apartments in this legatee's house, attended only by a female nurse, who for some unexplained reason, was not permitted to be present to attend her patient while this paper was prepared and executed—and that, too, while he must have been suffering the most intense pain.

The testimony shows that decedent was strongly attached to contestant. He told the nurse that she was "the dearest friend he had on earth." She requested this legatee, some time before the will was drawn, to write to contestant's family of his sickness and condition. He complied with this request, but the postal mark on the message showed that he somehow delayed posting the message until after the paper was drawn and executed; and it cannot be fairly said that it even then adequately represented the decedent's condition. The evidence showed that Marshall was all the while co-operating with this legatee to get decedent

to make a will, and that it was through him that the theory that "his property would go to the state," etc., was communicated to decedent.

This legatee was not related to decedent in any way, and it certainly was not natural that he should have made him a co-legatee with the pastor of the church, of a legacy which, if the church legacy fails, would amount to nearly \$12,000 in cash. Without going farther into detail, it is apparent from the case that it was a fair question for the jury, whether or not this legatee had not exercised undue influence in obtaining this document. The draughtsman, at the original hearing before the surrogate, wholly omitted to testify before the surrogate that he read the will at all to decedent. This fact appears from the opinion of this court delivered on the reversal of the surrogate's decree.

It thus appears that Washburn was the only one of these subscribing witnesses who stood in the relation of a disinterested witness, and his testimony lacked an essential element required by statute; and the testimony of the others should have been submitted to the jury on questions of credibility.

It will, of course, not be understood that we express any opinion or make intimation with respect to the weight of the testimony of these witnesses one way or the other. We simply hold that it was for the jury to decide what weight there should be given to it.

Then, again, we hold that the question of undue influence ought to have been submitted to the jury. Here was an old man afflicted with senile cystitis, a disease which the experts testify causes the severest pain which the human system is capable of bearing. The doctors say that mechanical assistance is necessary to obtain relief; and that, unless relief is obtained by those means at frequent intervals, the pain is so great that the sufferer is unable to concentrate his thoughts on anything but his sufferings. It is not denied that the drafting of this paper was not com-

menced until some three and a half hours after that assistance had been given in the morning, and that the draughtsman was thus engaged for an hour and a half. Here, then, was a circumstantial case, assuming its truth, which strongly tended to show that decedent was not in a condition to make a will, and that his state was not truthfully described by the subscribing witnesses. He was then an easy subject for undue influence and other specific fraud. And it was for a jury to say whether this will was not the outcome of that state. The nurse testifies that when the draughtsman and witnesses left the room she found him groaning and even weeping, apparently in intense agony, and that later he told her that he had been having some writing done, but his head would not let him finish it.

Another witness testified to statements by the draughtsman that he felt anxious lest decedent should be unable to finish the business at all. Certainly there was cogent evidence from all these circumstances which strongly tended to contradict the proponent's testimony, and the case should have been submitted to the jury on that ground, as relating to capacity.

So also on the specific question of undue influence and fraud, as distinguished from mental incapacity resulting from the agitated state and enfeebled bodily condition, the case should have gone to the jury.

The opinion delivered at the former general term contains this forcible and significant language bearing on this point: "The whole narrative is unnatural, under the circumstances of this case; something more than proof of a formal execution is necessary. There must be shown facts which establish that the paper proposed was an intelligent expression of the testator's will. *Marx v. McGlynn*, 88 N. Y. 357; *Matter of Smith*, 95 N. Y. 516. It is more natural to suppose that the residue clause was contrived and designed to save the legacy in case of the death of the testator within two months, and there is no proof,

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indeed every inference is to the contrary, that he was told or knew of the effect of his death within some two months upon the church gift, and that to meet that contingency, an absolute gift was assigned by the testator to strangers. I believe the testator was ignorant of the effect of the clause, and, therefore, the instrument is not an expression of his will."

The facts upon which the language was predicated are stated in the opinion, and, with the exception of the statement there contained that the will was not read to the testator, the same facts, or their equivalents, were proved on the trial at the circuit.

Of course it may be said that the case differs in some respects from that presented on the former appeal in that there is now the statement that the paper was read, clause by clause, and there are facts from which it is claimed that this church was not subject to the statute which affected legacies to other bodies under like circumstances. But it can scarcely be said that that point could have been so clear in the minds of these people that there was not even a motive to contrive this residuary legacy as against the possibility of its invalidity and failure of the legacy to the church. From aught that we can see, a doubt on that point would constitute quite as strong a premise upon which to base the language of the learned judge at general term, as if there had been a conviction that the law was against proponents in this respect. Indeed, we regard the case as altogether doubtful on that point now.

The learned surrogate adjudged the invalidity of this legacy on that precise ground. And the proponents themselves seem to have entertained most serious doubt on the subject, because they afterwards prepared a declaration of trust for the benefit of the church in the money which might come to them under the residuary clause. We fail to see how it is fairly debatable ground that the case has

been so changed that the language of the former opinion has become inapplicable to the case in this respect.

We also hold that the learned trial judge erred in the following rulings on the trial: Hypothetical questions reasonably descriptive of decedent's condition and disease, as shown by other testimony, were put to professional witnesses, and they were not permitted to testify their opinions respecting the resulting mental condition of the patient, and his capacity to concentrate his thoughts on matters of business, to resist importunity, and generally to overcome influence.

We also fail to see how the declaration of trust was competent evidence in any view. It was an act done long subsequent to the events upon which the case turned. Hence, the admission of this document substantially permitted proponents to make *ex post facto* evidence on their own behalf to repel inferences of fraud and undue influence. It should not have been received.

We also hold that the action of the surrogate, after the proceedings in the circuit, was not authorized.

The decree entered, and all proceedings in the surrogate's court subsequent to the trial must be reversed, vacated and set aside. The verdict must also be set aside, with all subsequent proceedings in the circuit court, and the case must be remanded to that court for a new trial under and pursuant to the original general term order settling issues and directing a jury trial. And, inasmuch as the case was taken from the jury at proponent's solicitation, the contestant should be allowed her costs and disbursements on this appeal, but we will reserve the question whether or not they shall be charged against proponents individually, or out of the estate, to abide the event of the jury trial.

BARNARD, P. J., concurs; DYKMAN, J., not sitting.

MARIA McKEOWN *et al.*, Respondents, v. JOHN OFFICER, as
Executor, etc., *et al.*, Appellants.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Will. Power of disposition.*—A gift of property, by will, to the wife, with absolute power to dispose of or charge it with debts, is not repugnant to a subsequent provision giving the undisposed, or unexhausted, amount to residuary legatees.
2. *Same. Life estate.*—The use of the words, "I devise all my real estate," etc., in a will, is not necessarily incompatible with an intent to give a life estate, with power to consume the whole, or absorb it by contracting debts.
3. *Same. Fee.*—The fact that the gift is absolute for purposes of enjoyment, with power of disposition for that object, does not enlarge the estate into a fee.
4. *Same. Charitable institutions.*—A bequest of the residue of an estate, after a life estate to the testator's wife is given with absolute power of enjoyment and disposition, to charitable institutions, is contrary to the provisions of the statute of 1860, and valid only to the extent of one half of such residue.
5. *Same. Statute of 1860.*—The prohibition of the statute is peremptory and operates upon the capacity of the testator to make a will which offends the statute; and any heir at law, who would be entitled to share in his estate, in case of the entire or partial invalidity of a will, because its provisions are violative of the statute, may insist upon such restriction, though not one of the relatives designated in the statute.

Henry Marshall, for appellants.

Jacob Brenner, for respondents.

DYKMAN, J.—This is an appeal from a judgment of the special term, and from the order denying a motion to dismiss the complaint, and the appeal involves questions of law only.

The plaintiffs are the next of kin and heirs at law of John McKeown, deceased, and the defendants are the executors of McKeown, and the residuary legatees under his will. The action was brought to secure a judgment of the court, which

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shall declare the bequest of the residuary estate of the deceased to the two corporations named in the will valid, to the extent of one-half of the estate of the testator, and no more, pursuant to chapter 360 of the Laws of 1860.

The provisions of the will which is involved in this action, is as follows :

“ *Third.* I give, devise and bequeath to my dearly beloved wife, Abby McKeown, all the rest, residue and remainder of my estate, both real and personal, of every kind, or where-soever situated, of which I may be possessed at the time of my decease, for her support and comfort, to vest absolutely in her, the said Abby McKeown, during her lifetime, and, at her decease, after her lawful debts are paid, I further give, devise and bequeath to the Board of Home Missions and the Board of Church Extension of the United Presbyterian Church of North America, the residue of my estate, the same to be sold and turned into cash, and divided equally between the two boards.”

The wife of the testator, and the defendant, John Officer, were appointed executors in the will, and both qualified.

The testator left no child and no descendants of any child and no father or mother, but he left the three plaintiffs, who were his nephews and nieces and another nephew, who has since died unmarried and without children.

The testator left real and personal property of the value of about \$6,000.

The widow of the testator died in September, 1887, leaving the entire principal of the estate unexpended, and having used and appropriated the income thereof only during her widowhood, and there now remains in the hands of the executor the entire principal of the estate, with no unpaid debts or liabilities of the testator or his wife to be deducted therefrom.

After the death of the widow the executor undertook to sell the real estate of the testator and the question whether the will bestowed a power to sell the same was submitted

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to this court and we decided that the executor was vested with a power to sell, and in that case the questions involved here were incidentally considered. *Officer v. Board of Home Missions*, 47 Hun. 352.

In the beaten way of common sense and fundamental principles this is a plain case. The intention of the testator is easily discovered, and the law which must control is easily understood.

The primary gift was to the wife absolutely, for life, and it was within her power to appropriate, enjoy and use all the property during her lifetime, and the residuary legatees took no interest which would have authorized them to interfere with such use in any way.

But the property only vested in her absolutely during her lifetime; at her decease and the payment of her debts the residue of the estate was devised and bequeathed to the two boards designated. The gift to the wife was conditional upon its use and appropriation by her during her lifetime, and the gift of the residue dependent upon the same contingency.

There is no repugnancy in the gift of the property to the wife for life with an absolute power to dispose of the same or charge it with the payment of her debts, and a subsequent provision giving the residue to the charitable boards upon the failure of the wife to dispose of or exhaust the same in her lifetime. *Norris v. Beyea*, 13 N. Y. 273; *Crozier v. Bray*, 39 Hun, 123; *Terry v. Wiggins*, 47 N. Y. 512; S. C., 2 Lans. 272.

The same rule is established by the following provision of the Revised Statutes, to wit: "Where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power should not be

executed or the lands should not be sold for the satisfaction of debts." 1 R. S., 732, § 81.

This provision makes the absolute estate created in the wife subject to the limitation over to the residuary legatees, in the event of the failure to exercise her beneficial power of disposition, and thus imparts validity to the limitation in the event which has happened.

While it is true that the word estate, employed in will in connection with a devise, ordinarily indicates an intention to impart a fee, and operates upon the title rather than the *corpus* of the property, yet such inference may be controlled and restricted by the other provisions of the will and there is nothing in the words "I devise all my real estate," etc., necessarily incompatible with an intent to devise a life estate, with power to consume the whole or absorb it by contracting debts. *Terry v. Wiggins*, 47 N. Y. 515.

Neither does the fact that the gift is absolute for purposes of enjoyment, with a power of disposition for that object, enlarge it into a fee. *Terry v. Wiggins*, 47 N. Y. 516.

So far, the will is plain and the intention of the testator can be carried into execution if it does not contravene the provisions of the statute of 1860, which must now receive our attention.

That statute is as follows: "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)." Chapter 360, Laws 1860.

This statute is clear and concise, and the testator undertook to do what it forbids. He had a wife, and he wrote

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and executed a will which gave to two charitable corporations more than one-half of his estate, and so committed an offense against the statute.

It is true that such was not the necessary result of the residuary gift, because the wife of the testator under the power and right bestowed upon her by the will, might have used and consumed more than one-half of the estate, and left the residue unexpended for the residuary legatees.

Yet we think as the whole estate might remain as it was unused by the wife in her lifetime, and was directed to pass to the residuary legatees in that event, the will falls under the condemnation of the statute, and cannot be sustained in its entirety.

It was the design of this statute to inhibit the disinherison of persons standing in near relation to testators with natural claims upon their bounty from pious or benevolent motives, and the prohibition is peremptory, and operates upon the capacity of the testator to make a will which offends against the statute.

It restricts the power of a testator in the disposition of his estate, and any heir at law who would be entitled to share in his estate in case of the entire or partial invalidity of a will, because its provisions are violative of the statute, may insist upon such restriction, although not one of the relatives designated in the statute. *Harris v. Slaght*, 46 Barb. 470; S. C. 4 Abb. N. S. 421.

The statute is a continuation of the mortmain policy and designed "to prevent languishing and dying persons from being imposed upon by false notions of duty prompting them to disregard the claims of family and kindred."

The trial judge has found that the two religious bodies named in the will are incorporated under the laws of the state of Pennsylvania, but there is no finding respecting the validity of the gift in that state, but as no question was raised before us in respect to that subject, we assume that

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the gift is in accordance with the laws of the state of Pennsylvania.

Our conclusion therefore is that the bequest of the entire residue of the estate of the testator to the two religious corporations was in contravention of the statute of 1860, and valid only to the extent of one-half of the residue of the property, and as to the other half the testator died intestate.

The judgment should therefore be affirmed, with costs.

BARNARD, P. J., concurs ; PRATT, J., not sitting.

NEW YORK RUBBER COMPANY, Appellant, v. JOHN ROTHERY *et al.*, Respondents.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Appeal. Case.*—Both parties, where a case is sent back for resettlement, may show the actual facts as they happened upon the trial.
2. *Same. Request to charge.*—The marking a request to charge "refused," when not refused in the presence of the jury, is not material; nor can a refusal be available, unless an exception was taken at the time.

Appeal from an order granted on an application to settle a case on appeal.

Lee & Lee, for appellant.

H. H. Hustis, for respondents.

PRATT, J.—This motion presents an entirely different appearance from what was presented upon the papers before the court of appeals. 12 N. Y. State Rep. 53.

That court held, as appears from the opinion, that a "party is entitled as of strict right to have the case show the actual facts as they really happened on the trial, so that an appellate court can decide the case upon a record, which is absolutely correct," and in accordance with this principle the case was set back for resettlement.

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When the case was again presented to the judge, who tried the case, it was open to both parties "to show the actual facts as they happened upon the trial," and to this end the attorney of the defendants has made another affidavit and the judge has furnished a certificate stating his recollection of what took place.

The defendants' attorney denies most specifically and emphatically the material allegations made upon the part of the plaintiff, and such is the effect of the certificate of the judge.

This view is strongly corroborated by reference to the charge as delivered to the jury.

The only reasonable conclusion seems to be that the affiants are mistaken in supposing the rulings were read to the jury after the charge, or that the judge was notified of any exception that was taken to a refusal to charge the fifth request.

The plaintiff's counsel undoubtedly notified the stenographer of his exception, but it does not seem possible, upon reading the charge in connection with the affidavit of Mr. Hustis, that such an exception presented to the judge would have escaped his attention.

The mere marking the request "refused" was not material, if, in fact, it was not refused in the presence of the jury. Neither could a refusal be availed of unless an exception was taken at the time.

It has clearly enough appeared at all times that the marking of this request "refused" was a mistake, but it clearly appears now that, in fact it was not refused, and, further, that no exception was taken nor any objection raised that the charge did not comply with all the requests presented.

Order affirmed, with costs.

DYKMAN, J.—This is an appeal from an order made upon the motion to resettle the case in this action, but we think it cannot prevail. Under the decision of the court of appeals

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the case was to be resettled, and that has now been done by the insertion of the history of the fifth request to charge the jury. Such statement contains the facts, and will enable the appellate tribunal to determine the legal effect of the request to charge, and the disposition made of the same by the trial judge.

The decision of the court of appeals did not dictate the mode of settlement to be pursued in obeying the same, and that was obviously left to the determination of the trial judge.

We think the order should be affirmed, with ten dollars costs and disbursements.

BARNARD, P. J. not sitting.

ALANSON R. SIMONSON, Respondent, v. ALFRED L.
SIMONSON, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Services. Gratuitous.*—There is nothing to call for a conclusion that services are done gratuitously, where the parties, though related do not form one family.
2. *Same.*—A person, who is in the employment of an estate, may, during the time he is so employed, render services for the executor personally, in case the estate does suffer in consequence, and may recover for the work so performed.
3. *Same. Question of fact.*—The omission by the employee to present a claim for such services, until he has left the employment of the executor, is not sufficient to bar a judgment therefor; at most it is a question for the jury.

Appeal from a judgment entered upon the verdict of a jury.

A. H. Ammidown, for respondent.

Blair & Rudd, for appellant.

BARNARD, P. J.—The evidence shows that the plaintiff

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rendered valuable service to the defendant, and upon his express request. The service was, in general terms, the collection of rents, and procuring tax bills, and directing and overseeing repairs upon real estate of the defendant's wife. The value of the services is proven to be very much greater in amount than the verdict of the jury. Although the parties are related, they did not form one family, and there is, therefore, nothing to call for a conclusion that the service was done gratuitously on that account. The plaintiff was an employee of an estate of which the defendant was one of the executors. There were two others, and the plaintiff was employed in the office of the estate according to a wish expressed by the testator in his will. The services in question were rendered during the time he was so employed, and the defendant claims that the services were rendered under the general employment, and were of the same nature of service as those rendered the estate under the employment. *Smith v. The L. I. R. R.* (102 N. Y. 190; 1 N. Y. State Rep. 403), is an authority that a person in the employment of a firm, may render service during business hours, to another party, and may recover for the work so done.

The fact is to be considered with respect to the question whether it was gratuitous. The request was made to the plaintiff to do the work, not by the executors, but by an individual. The subject of the service was not the estate property, but the property of the defendant or his wife. It is neither proven or claimed that the estate suffered in consequence of the work done by plaintiff for defendant. It is neither proven or claimed that there was any express agreement that the work was to be gratuitous. Under this circumstance, the law implies a promise to pay. *Ross v. Hardin*, 79 N. Y. 84.

The omission to present the claim until after the plaintiff left the office of the executor, was a fact which existed in the case of *Smith v. The L. I. R. R.* The court of appeals

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held it not to be a fact sufficient to cover a judgment for the service. At most it was a question for the jury, and the jury on all the evidence, has found that the service was not gratuitous.

The judgment should, therefore, be affirmed, with costs.

All concur.

MILES W. OLMSTEAD, Appellant, v. ASA DOLEN, Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

False imprisonment. When arrest justified.—Where the plaintiff obtained a horse and wagon from a boy in charge of defendant's livery stable, at an early hour in the morning, on the representation that he was a regular customer at the stable, which statement was untrue, and that he would return about nine o'clock that day; but he did not give his name, the horse and wagon did not return, and the defendant procured a warrant for his arrest; and the plaintiff attempted to escape, after he had notice that a warrant had been issued; and when taken before the magistrate, he pleaded guilty, paid his fine and was discharged; the facts justified the arrest, and an action for false imprisonment cannot be maintained.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial made on the minutes.

The defendant, in his answer, admits that he caused the arrest for the cause stated in the complaint and contends that the plaintiff was guilty of the offense. The jury have found in favor of the defendant. The finding is abundantly supported by the evidence. It appears from the evidence that on the 15th of April, 1888, the plaintiff and another man went to the livery-stable of the defendant to hire a horse and wagon. It was about three o'clock in the morning. The men waked up the boy in charge of the stable, and the

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plaintiff got of him a horse and wagon on the statement that he would be back by nine or ten o'clock on that day. He further stated that he was a regular customer at the defendant's stables, and had hired buggies there before. The fact was not true. He had never hired horses at the stables before, and he did not give his name.

The boy let the plaintiff have the property solely on this false statement. The horse and wagon did not return as promised. Sunday, Monday and Tuesday passed without their return, and on Wednesday the defendant made a complaint.

The arrest was made under circumstances which justified the inference that the plaintiff was attempting to escape after he had noticed that the constable had a warrant for his arrest. When taken before the justice he pleaded guilty to the charge, and paid twenty dollars, and the charge was withdrawn. Whether or not the charge would have held good upon a trial, is of no importance. The facts proven justified the arrest. *Thaule v. Krekeler*, 81 N. Y. 428.

The return of the plaintiff with the property on the evening of Wednesday is a fact of no importance, as the warrant was then in the hands of the officer, and the case must be determined by the facts as they existed in the afternoon of Wednesday, when the warrant was issued.

The plaintiff's conduct subsequent to the return is not free from unfavorable inferences.

The judgment should be affirmed, with costs.

PRATT, J., concurs ; DYKMAN, J., not sitting.

JOHN OELERICH, Respondent, v. THE NEW YORK CONDENSED MILK CO., Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Negligence. Rapid driving.*—It is negligence to drive a wagon rapidly, when the wagon is so constructed that the driver can only see an object some twenty feet or more in front of the horses' heads.
2. *Same. Intoxication.*—Injury by reason of the habit of strong drink, or a single instance of indulgence, is imputed to the master, while the servant is engaged in his business.
3. *Same. Child.*—The question of contributory negligence, in a case of a child, is one for the jury, where its tender age is to be considered with reference to the degree of prudence and caution required of him under the circumstances.

This action was brought by an infant, through his guardian *ad litem*, against defendant for personal injuries. A judgment was rendered on a verdict in favor of plaintiff, and a motion for a new trial on the minutes denied, and defendant appealed from such judgment.

M. L. Towns, for respondent.

Wm. W. Niles, Jr. (*Wm. W. Niles*, of counsel), for appellant.

BARNARD, P. J.—The evidence fully sustains the verdict of the jury in this case. The defendant's driver drove on a quick trot around a corner in a thickly populated portion of Brooklyn, and run over a boy under six years of age. The wagon was so constructed that the driver could only see an object some twenty feet or more in front of the horses' heads.

The driver had been drinking intoxicating liquors. It was negligence to drive a wagon when danger could not be seen. It was especially dangerous and negligent to drive so fast when the driver could not see the ground within twenty feet of his horse, and the habit of strong drink or

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a loss certain by a single instance of indulgence, must be imputed to the master under the settled law in respect to master and servant while the servant is doing the master's business. The question of the contributory negligence of the child is one for the jury. This is the general rule, and especially is the rule where the tender age of a child is to be considered with reference to the degree of prudence and caution required of him under the circumstances. *Kunz v. The City of Troy*, 104 N. Y. 344; 5 N. Y. State Rep. 642.

The judgment should, therefore, be affirmed, with costs.

All concur.

JOHN DEWITT WALSH, Appellant, v. WILLIAM C. BROWN,
as Assignee, etc., Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Appeal. Re-argument.*—A re-argument will not be granted, where counsel fail to direct attention to a statute through ignorance of it, if no good purpose will be subserved by allowing it.
2. *Same. Objections.*—The parties are presumed to know what the law is, even though the court does not; and it is the duty of the party, when an assignment is offered in evidence, to make such objections to its introduction as he intends to rely upon, and all other objections are then and there waived.
3. *Same.*—Where the assignment is eminently just and proper, and under the judgment the property will be equally divided, but if it is reversed, the assigned property will be diverted from an equal distribution among the creditors, a motion for a re-argument based upon a point not raised either on the trial, or on the appeal, should not be granted.

Motion for a reargument.

E. A. Brewster, for appellant.

Travis & Smith, for respondent.

PRATT, J.—This case was decided at the February general term. The action was brought to recover the value of

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certain tissue paper, and the question involved was whether the title to such paper passed to the defendant under an assignment for benefit of creditors, executed by Henry K. Thompson and William M. Thompson to William C. Brown the defendant.

In the argument and decision of the case, the act passed May 15, 1888, amending the act entitled "An act in relation to assignment of estates of debtors for the benefit of creditors," being chapter 294 of Laws of 1888 (page 509), was entirely overlooked and hence this motion is made.

The act referred to provides as follows:

"Every conveyance or assignment, made by a debtor, of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence, and the kind of business carried on by such debtor at the time of making the assignment, and the place at which said business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town, such apt designation as shall reasonably identify such debtor. Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and shall be recorded in the county clerk's office, in the county where such debtor shall reside, or carry on his business, at the date thereof."

The act took effect July 1, 1888.

The assignment was made on the 17th of July, following, and failed to state the "kind of business" carried on by the assignees at the time of the assignment.

Assuming that the statute was intended to establish a new rule as to assignments, and that it is mandatory, the question arises, whether it is incumbent upon the court at this time, to grant a re-argument.

The case was decided rightly upon the facts and law as presented at the last general term when it was decided. It is not claimed that the court overlooked any point presented

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at that time, but it appears that court and counsel were ignorant of the statute above quoted, and the case was decided upon the facts and law as they were supposed to exist at that time.

The parties are presumed to know what the law is, even if the court does not; and when the assignment was offered in evidence, it was the duty of the plaintiff to make such objections to its introduction as he intended to rely upon, and all other objections were then and there waived.

The mistake was one easy to occur, as the official copy of the statute had been distributed but a few days. In fact it is doubtful if the act had been published at all, except in a fragmentary way, in newspapers; therefore no one was in fault, in being ignorant of its passage.

No good purpose can be served by granting a re-argument and reversing the judgment.

The assignment was eminently equitable and just, and under the present judgment the property will be equally divided, but if it is reversed, the assigned property will be diverted from an equal distribution among the creditors.

We think the plaintiff must stand by the theory of his case presented by his complaint, and upon the trial.

Motion denied.

All concur.

THE NYACK AND WARREN GAS LIGHT CO., Respondent, v.
THE TAPPEN ZEE HOTEL CO. (Limited), Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Attachment. Vacation.*—An attachment will be vacated, where the answering affidavits meet and answer fully the case made by the original papers.
2. *Same.*—So, an attachment, on the ground that defendant is about to remove his property from the state, will be vacated, where the removal was openly made, and the goods were removed from the state, while they were in transit to the city of New York for storage and safe-keeping, and the circumstances of suspicion, upon which the attachment was granted, have been satisfactorily explained; but where some apparent grounds existed, it must be done upon condition that no action be brought upon the undertaking.

Appeal from an order denying a motion to vacate an attachment.

A. S. Tompkins, for respondent.

George Wilcox, for appellant.

PRATT, J.—It may be doubted whether the papers upon which the attachment was granted were sufficient. But if that question be decided in favor of plaintiff, it appears that the answering affidavits of the defendant meet and answer the case made by the original papers.

The person who removed the goods from Nyack to New York avers that he acted openly, showing to all inquirers the written instructions under which he acted.

It appears that if the goods were removed from the state of New York, it was but a temporary absence, while they were in transit through the state of New Jersey to New York for storage and safe-keeping.

The circumstances of suspicion upon which the attachment was granted having been explained, it should be vacated. But as some apparent grounds existed, which

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may well have given rise to alarm to creditors, it must be upon condition that no action be brought upon the undertaking. Upon that condition being complied with, order appeal from reversed, and attachment vacated. No costs.

All concur.

ELIZABETH J. OSBORNE, Respondent, v. THE New YORK
MUTUAL INSURANCE COMPANY, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Insurance. Question for jury.*—In an action on a policy of marine insurance, the evidence as to the seaworthiness of the vessel insured by defendant was held sufficient, in this case, to entitle the plaintiff to go to the jury on the question of seaworthiness.
2. *Same. Seaworthiness.*—Seaworthiness is a relative, not an absolute, term; and when it is held that it is a condition precedent to the taking effect of the insurance policy that the vessel is seaworthy, it is not intended that an old vessel must be understood to be equally sound as a new vessel with a higher rate.
3. *Same. Evidence.*—In an action on a policy of marine insurance, evidence of the prices demanded by mechanics, in the port of distress, to make the repairs necessary to enable the vessel to continue her voyage, is admissible, to justify the abandonment.
4. *Same. Damages.*—Advertisements for sealed proposals and the lowest bids received, are proper for this purpose, and competent for the jury to consider in connection with the other evidence.
5. *Same. Burden of proof.*—The burden of showing the expense of making such repairs, is on the insured.

This was an action upon a policy of marine insurance issued by defendant. The complaint alleged that said vessel, while proceeding on the voyage, was, by the perils of the sea, damaged in her hull, rigging, and appurtenances, insomuch that for safety said vessel put into the port of St. Thomas, where, upon a survey duly called upon the plaintiff's behalf, said vessel was found to be, and in fact was, so seriously damaged and injured as to become a total loss, and

was thereafter abandoned by the plaintiff to the defendant, and due notice thereof, in writing, given to the defendant. Among other defenses, defendant claimed that the vessel was not seaworthy at the date of the policy, and that the damage was not caused by the perils of the sea, but was the consequence of her bad condition at the beginning of the voyage.

Appeal from a judgment in favor of plaintiff, rendered on a verdict, and from an order denying a motion for a new trial.

George A. Black, for appellant.

James K. Hill and Wing & Shoudy, for respondent.

PRATT, J.—The most important matter for consideration is whether upon the proofs introduced as to seaworthiness of the vessel, the plaintiffs were entitled to go to the jury on that question. The testimony on this point of Captain Osborne is to the effect that on the voyage from Cape Town to Pernambuco the vessel was in splendid condition, and arrived at Pernambuco in good condition, December, 1885. Was in good condition when towed out of the harbor to begin the voyage upon which the loss took place.

The testimony of Captain Osborne is criticised as being that of the person whose conduct is under investigation, and who may also be considered to have a money interest in the litigation, his wife being the plaintiff.

But he is corroborated by the testimony of the official surveyor who examined the vessel June 29, 1885, and found her seaworthy, and so reported. He says he went all over very carefully, and as far as he could see, she was in good condition. He saw no signs of old age about her; there were no missing beams. Upon the report then made, the rating of the vessel in the shipping record was continued for a year.

The chief surveyor of the board of underwriters, of which

defendant is one, testified for plaintiff, and explained that when a vessel had had her rating five years and it was extended one year, except in a vessel built in the Mediterranean, she was pretty near her end.

Seaworthiness is a relative term, not an absolute one. And when it is held that it is a good condition precedent to an insurance policy taking effect that the vessel be seaworthy, it is not intended that a vessel sixteen years old at night to lose her rating must be understood being equally sound as a new vessel with a higher rate.

An illustration is found in the testimony of McLeod called by defendant, who states that when in command of a sugar vessel he discovered a leak while at the wharf in Cuba, yet he started for New York with the leak, and considered it good seamanship. The vessel reached home in safety and when put on the dry dock two planks in the bottom were found broken. Being asked if he considered her seaworthy when in that condition, he says: "That is rather a difficult question to answer," but under all the circumstances considered that it was.

The argument of defendant is that in view of the facts shown by the log that no extraordinary weather prevailed, the loss of the vessel shows conclusively that she was unseaworthy when the voyage begun.

After some hesitation we are of opinion that the testimony justified the submission of the question to the jury and that their verdict must control.

The exception by defendant to the evidence of the prices demanded by mechanics in St. Thomas to make the repairs necessary to enable the vessel to continue her voyage, was not well taken.

The plaintiff had the burden of showing the expense of making such repairs. To do that, the advertisements for sealed proposals were put in evidence, and, also, the lowest bids received. These were competent for the jury to consider in connection with the other evidence.

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In the absence of collusion or fraud they would go far to show what would be the expense of making the repairs.

The exceptions to the charge to the jury do not require discussion.

Upon the whole case we are of opinion that the verdict should be affirmed, with costs.

All concur.

ASA W. PARKER, Respondent, v. THERESA B. COLLINS
et al., Appellants.

Supreme Court, Second Department, General Term, June 28, 1889.

Mortgage. Foreclosure.—Where the referee finds that a part of the money secured by a mortgage was delivered by the mortgagee to a creditor of the mortgagor under an alleged arrangement between the parties, the mortgagee is entitled to a judgment of foreclosure for the present debt, though such arrangement is denied by the mortgagor.

Appeal from a judgment of foreclosure entered upon the report of a referee.

Asa W. Parker, attorney in person (*C. D. Rust* and *E. G. Nelson* of counsel); *T. J.* and *R. F. Tilney*, for defendants *Tilney* and *Collins* (*Horace Graves*, of counsel).

George V. Brower, for defendant *Edgerton*.

BARNARD, P. J.—There is very little dispute as to the facts in this case. *Theresa B. Collins* owned premises on which she was building ten houses in Brooklyn. Her husband, *Jeremiah Collins*, was her agent.

Hobby & Doody were dealers for materials in building, and had sold materials for these houses.

On the 13th of April, 1888, the unpaid bills for these materials due *Hobby & Doody* were \$8,920.76. The buildings were unfinished, and it was expected that more lum-

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ber would be needed. The plaintiff was expected to advance money to complete the houses. Under this consideration of affairs the plaintiff, Doody, for Doody & Hobby, and Jeremiah J. Collins for Mrs. Collins, met. The mortgage was to be given for \$22,000. It was so given. The amount of the mortgage was agreed to by all parties. The only difference is this. The plaintiff claims that the parties agreed that the mortgage was to be given to secure \$5,000, which Doody & Collins agreed should represent the real debt then existing from Mrs. Collins to Doody & Hobby. The defendant, Mrs. Collins, says that the \$22,000 was all to be advanced by Parker to her, and that the arrangement as to the Doody & Hobby debt is without foundation of fact.

Upon this question the plaintiff seems to have preponderating evidence. He testifies to the agreement, and that under it he paid the full sum of \$5,000 to Doody. Doody testifies that he was present when the agreement was made, and that under it he got of plaintiff the \$5,000. Jeremiah J. Collins denies the arrangement altogether. There is a serious mistake somewhere, and the referee has found that the arrangement was made, and thus a mortgage is established for a present debt and for future advances which were never made. The sale is only for the present debt, and there is no proof given in respect to a future advancement.

These were probably never needed, as the property was sold to Tilney. The case is not one of diversion of a mortgage from its purpose, but of a mortgage where all the considerations named have not been advanced.

The judgment should, therefore, be affirmed, with costs.

All concur.

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EDWARD S. RILEY, Appellant, v. THOMAS H. SKIDMORE *et al.*, Respondents.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Attachment. Sufficiency of affidavit.*—The affidavit in this case was held to contain a sufficient statement of facts to give a justice of the peace jurisdiction to issue an attachment.
2. *Same. Abuse of process.*—There is no abuse of process, where the property attached is insufficient to satisfy the execution.
3. *Same. Undertaking. Amendment.*—A justice of the peace has power to permit an amended undertaking to be filed *nunc pro tunc* in attachment proceedings.

Appeal from a judgment entered upon an order granting a nonsuit and dismissing the complaint.

The action was brought to recover damages alleged to have been occasioned by a wrongful attachment.

The following is a copy of the affidavit upon which the attachment was issued :

ORANGE COUNTY, }
CITY OF NEWBURGH, } ss :

Thomas H. Skidmore, being duly sworn, says he is one of the plaintiffs herein, that the plaintiffs have applied to the said justice for a summons herein, and hereby apply to said justice, to grant at the time the summons is issued, a warrant of attachment against the property of the defendant.

That this action is brought to recover for the following cause :

That between the 1st of January, 1887, and the 11th of April, 1887, the plaintiffs sold and delivered to the defendant, at his order and request, certain goods, wares and merchandise, consisting mainly of flour, at and for prices agreed upon, amounting in all to the sum of \$106.27,

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part of which has ever been paid, except the sum of \$3.75; and that there is now due and owing from defendant to plaintiff for the same, the sum of \$102.52, with interest from the 11th of April, 1887.

That a sufficient cause of action exists, in favor of the plaintiffs against the defendant, to recover damages for the cause of action above specified, as above stated.

That the plaintiffs are entitled to recover herein, therefor and thereon, the sum of \$102.52, over and above all counter-claims known to deponent. That the defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with intent to defraud his creditors, and especially these plaintiffs.

That the defendant claims to have made a bill of sale, of all his personal effects, to one John J. Riley; but the same is not on file in the town clerk's office, where said defendant resides and does business. And that the defendant is in possession of his store, and has been ever since the alleged time of making the alleged bill of sale.

THOMAS H. SKIDMORE.

Sworn to before me, this 18th }
day of June, 1887. }

GRANT A. TAYLOR,
Notary Public, Orange Co.

John Miller, for appellant.

G. B. Taylor, for respondents.

PRATT, J.—The affidavit made before the justice stated facts sufficient to call for an exercise of his judicial discretion. That gave him jurisdiction to issue the attachment.

There is no evidence of any abuse of the process; the property attached was not enough to satisfy the execution.

The permission accorded to the plaintiffs by the justice of

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the peace to file an amended undertaking *nunc pro tunc*, was within his power, and was in furtherance of justice.

Judgment affirmed, with costs.

DYKMAN, J., concurs ; BARNARD, P. J., not sitting.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
v. CHARLES D. SUTTON, Appellant.

Supreme Court, Second Department, General Term, June 28, 1889.

Criminal law. Validity of sentence.—A sentence for assault in the third degree, imposing imprisonment for one year and a fine of \$250, and directing defendant to be imprisoned not to exceed one day for each dollar of said fine, etc., is in accordance with the Code. When the defendant has served out the term of his imprisonment, he can apply for a *habeas corpus*, and test the question upon that part of the sentence which imposes the fine, but he can have no relief until that time.

Nelson H. Baker, district attorney, for respondents.

Hiram Paulding, for appellants.

PRATT, J.—This is an appeal from a judgment of conviction of assault in the third degree.

There is no error in the judgment. By the Penal Code assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than \$500, or both ; section 222. The imposition of a fine is in addition to the sentence of imprisonment.

Section 718 of the Code of Criminal Procedure provides that where a fine is imposed a convict may be imprisoned until the fine is paid. The sentence imposed in this case was as follows : * * * “for the term of one year and to pay a fine of \$250, and be imprisoned not to exceed one day for each dollar of said fine,” etc.

The sentence was in accordance with the Code. When

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the defendant has served out the term of his imprisonment he can apply for a *habeas corpus*, and test the question upon that part of the sentence which imposes the fine, but he can have no relief now as the sentence is within the term of the law. If it shall turn out that the part of the sentence imposing the fine is void for uncertainty he can be discharged, but until then he is held under a perfectly valid sentence.

We see no error in the judgment, and the sentence seems to be in the exact form prescribed by law.

Judgment affirmed.

All concur.

THE PEOPLE *ex rel.* CHARLES E. STORMS, Receiver of Taxes,
v. JOHN BESSON, Supervisor, Town of Greenburgh.

Supreme Court, Second Department, General Term, June 28, 1889.

Municipal corporations. Salary.—The amendment of chap. 447 of Laws of 1875 to chap. 69 of Laws of 1868, relating to the salary of the receiver of the town of Greenburgh, etc., still leaves such receiver a salaried officer, and he is not entitled to the two per cent. on taxes returned unpaid, allowed by chap. 193, Laws of 1877, to receivers who are not paid by salary. The percentage on sums paid to, and collected by, him goes to make up the salary.

This is an application to compel the supervisor of the town of Greenburgh, to pay the receiver of taxes the sum of \$109.63, to which he claims to be entitled, being two per cent. of the amount of uncollected taxes returned by him, and since collected, with the statutory additions. The motion was denied, and relator appealed.

BARNARD, P. J.—The taxes of the town of Greenburgh, Westchester county, are collected by special laws: chapter 59, Laws of 1858. By this act the receiver of taxes was made a salaried officer. The fees went to the town and the

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town applied the fees so far as sufficient to the payment of the salary of \$1,000, and the remainder went to the town. Chapter 193, Laws of 1877, is not applicable to the town of Greenburgh, the receiver being a salaried officer, and this act only applies to towns other than those where the receiver is paid by salary. By chapter 447, Laws of 1875, the section of the act in respect to Greenburgh, which fixed the salary of the receiver, was amended so as to read as follows: "The percentage upon taxes paid to and collected by the receiver shall be his salary, and shall be paid to said receiver by the supervisor of the town of Greenburgh."

The effect of this amendment is still to leave the receiver a salaried officer. The uncollected taxes are not to be estimated in arriving at the compensation of the receiver. It is only percentage on sums "paid to and collected by" the receiver, which go to make up the salary.

The order should therefore be affirmed, with costs.

All concur.

BENJAMIN TUTHILL, Appellant, v. JOSIAH FELTER, Impleaded, etc., Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

1. *Place of trial.*—Where, on a motion to change the place of trial, it appeared that the plaintiff's agent who took the notes, and his employees who heard the contract at the time of the execution of the notes, live, and the goods for which the notes were given were to be delivered, in the proposed county, the issues will be more properly tried in, and the trial of the action is properly changed to, that county.
2. *Same. Affidavit.*—An affidavit of defendant in which the facts, to which the witnesses are expected to testify, are set out in full, is unobjectionable.

Appeal from an order changing the place of trial, upon

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the ground that the ends of justice and convenience of witnesses would be promoted.

Thomas J. Ritch, Jr., for appellant.

William McCauley, Jr., for respondent.

BARNARD, P. J.—The paper showed that the notes were given in Rockland county. The notes were given for wood to be delivered in Rockland county. The delivery was never made, as I infer from the pleadings and affidavits if the notes were given for wood to be delivered. If given for other sales, when there were deliveries made, then there is no defense to the action. The issues, therefore, would be most properly tried in Rockland county. The plaintiff's agent, who took the notes lives there, and the plaintiff's employees, who heard the contract when the notes were given, live there.

The defendant's witnesses are not very essential on the trial. None of them witnessed the contract, and whether the cargoes of wood which were delivered by the plaintiff's employees were in execution of the contract in which the notes were given, does not appear to be within their knowledge.

The affidavit of defendant upon the motion is unobjectionable. The facts which the witnesses are expected to testify to are set out in full, and without this the motion would have been denied.

The order should, therefore, be affirmed, with costs and disbursements.

PRATT, J., concurs.

LUDLOW W. VALENTINE, Appellant, *v*. HERMAN T. RICHARDT, Respondent.

Supreme Court, Second Department, General Term, June 28, 1889.

Arrest. Fraud.—A person, who wrongfully obtains personal property from another party, contracts a debt within the meaning of section 549 of the Code, and may, under subdivision 4 of this section, be arrested in an action upon contract express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the indebtedness.

Cornell, Secor & Page, for appellant.

Donohue, Newcombe & Cardozo, for respondent.

DYKMAN, J.—This is an action for the recovery of a judgment against the defendant for money and other personal property alleged to have been fraudulently obtained from the mother of the plaintiff by the defendant. It is true the complaint demands an accounting, but that prayer is unnecessary and immaterial, and the action is based upon the fraudulent obtainment of the money and personal property from the deceased woman. The claim has been assigned to the plaintiff by the administrators of the deceased, and he is in a position to maintain the action.

An order of arrest was granted against the defendant, which was subsequently vacated, and plaintiff has appealed from the last order.

If the defendant obtained, by fraud, from the mother of the plaintiff, upwards of \$10,000 of personal property, the law immediately implied a promise on his part to account to her for the same, and at any time thereafter she could have maintained an action against him upon such implied contract for the recovery of the property. This rule is applicable to personal property as well as money.

The conclusion is thus easily reached that by implication

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of law the defendant contracted a debt when he wrongfully obtained the property from the deceased, and by subdivision four of section 549, a defendant may be arrested in an action upon contract express or implied * * * where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability. So that a simple allegation in a complaint that a defendant was guilty of a fraud in contracting or incurring the liability upon which the action is based is sufficient to justify an arrest in the action.

The complaint in this action contains such a positive allegation, and if it be requisite to establish a fraud in the procurement of the money and property by the defendant, such fraud is manifested by the facts which prove its obtainment. If it was received by the defendant from the deceased, the surrounding circumstances all conspire to prove its procurement by fraud.

Our conclusion is that the order of arrest was properly granted, and that the order vacating the same was erroneous and should be reversed, with ten dollars costs and disbursements.

PRATT, J., concurs ; BARNARD, P. J., not sitting.

**JEROME B. WAAS, Respondent, v. BENJAMIN F. STEPHENS,
Appellant.**

Supreme Court, Second Department, General Term, June 28, 1889.

Malicious prosecution.—Where defendant, under an arrangement, connected a system of water-pipes with a main of the Brooklyn park commissioners, and the commissioners afterwards withdrew the permission, notified the defendant and directed plaintiff to disconnect the system, for doing which he was criminally arrested by defendant, there was no probable cause for the arrest, in case the plaintiff did the work in a proper manner, so as not to cause any unnecessary injury to the defendant.

Appeal from a judgment entered on the verdict of a jury, in an action for malicious prosecution.

E. H. Kissam, for respondent.

Orlando L. Stewart, for appellant.

BARNARD, P. J.—The defendant had an arrangement by which he was permitted to connect a system of water pipes with the main under the contract of the Brooklyn Park Commissioners. The permission was at the will of the park commissioners. They withdrew the permission and gave notice thereof to the defendant. The Board of Brooklyn Park Commissioners therefore gave notice to its officer, the plaintiff to disconnect the systems. He did so, and for this was criminally arrested by direction of the defendant.

After a hearing he was discharged. There was no cause for the arrest and none is pretended, except that the cut of the Stephens pipes from the park pipes could have been made in a different manner. This, if true, would show a mere error in judgment and would not justify a criminal arrest.

The defendant had the benefit of the evidence. The jury were told that they could find probable cause for the com-

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plaint if the plaintiff was doing his work so as to cause needless injury to the defendant's company. If the work was being done in a proper manner there was no probable cause for the arrest. The jury have found the cut properly made, and under such a finding no ordinarily prudent man could have supposed there was a criminal offense committed by plaintiff. He was doing a duty under the order of his superiors. They had the right and the power to make the order, and the plaintiff did the work without needless injury to the defendant. The case shows no error, and the judgment should therefore be affirmed, with costs.

All concur.

GEORGE VAN GORDEN, Respondent, v. ALLEN B. SACKETT,
Appellant.

Supreme Court, Fourth Department, General Term, July 20, 1889.

1. *Sale. Memorandum.*—Without a consideration to support the contract, a memorandum of sale of personal property is invalid.
2. *Same. Evidence.*—Parol evidence as to the time and manner of payment is not necessarily inconsistent with a memorandum, which contains no provision upon this subject.
3. *Same.*—Where, under a contract to deliver a certain amount of produce, it was understood that the vendor, who was only a tenant in common therein, should draw what he had, and receive pay therefor, without reference to the fact whether his co-tenant drew his share, the purchaser, after receiving and retaining the vendor's share, is not in a position to assert the entirety of the contract, but is bound to pay for the amount delivered, and may resort to his claim for damages for the non-delivery of the balance.

Appeal from a judgment of the county court affirming a justice's judgment.

The action was to recover the value of 50 71-100 bushels of buckwheat sold and delivered to defendant on 8th November, 1886. It was shown that upon that day the buck-

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wheat was delivered by the plaintiff to and received by the defendant, and that its value was forty-five cents a bushel; that the plaintiff demanded pay and defendant refused, claiming that plaintiff had sold him 200 bushels and he would pay when the rest was delivered. The defendant put in evidence the following paper signed by plaintiff :

“ WATKINS, N. Y., *November 4, 1886.*

“ I agree to deliver to the Seneca Lake Steam Mills, Watkins, N. Y., about 200 bushels of buckwheat at forty-five cents per bushel of 50 lbs. on or about the 15th of November, 1886, quality dry and clean. Sold through Vernon C. Huey.

“ GEO. VAN GORDEN.”

It appears that defendant was proprietor of Seneca Lake Steam Mills and was running them in 1886, and that Huey was his agent to purchase buckwheat, and made the arrangement with plaintiff in pursuance of which the plaintiff made the delivery.

In testifying to the transaction with Huey the plaintiff said : “ I told him I had about 100 bushels to sell. I told him it was partnership buckwheat; my share would be about 100 bushels. He wrote the contract for about 200 bushels. He said the other party could draw in theirs. I told him I didn’t think they would draw it; hadn’t seen them. I told him there might be a kick about paying for it. He said no, draw in what I had, to tell them that it fell short, and it would be all right, and I would get my money. This was before the contract was signed.” The plaintiff delivered all he had except what he saved for his own use.

O. P. Hurd, for appellant.

W. L. Norton, for respondent.

MERWIN, J.—Assuming that the instrument of November 4th, 1886, was not defective by reason of its failure to

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designate the name of the buyer except as it might be inferred from the designation, "Seneca Lake Steam Mills," as the name of the agent Huey, and assuming that the quantity was sufficiently definite for enforcement, still it was not valid without a consideration to support it.

In *Justice v. Lang* (42 N. Y. 493), it was held that the use in such an instrument of the expression, "cash upon such delivery," implied a promise on the part of the party taking it to pay the price when the goods should be delivered, which promise furnished sufficient consideration for the agreement to deliver. In the same case it was afterwards held in the court of appeals (52 N. Y. 323) that it was a question of fact for the jury to determine whether or not there was a promise to receive and pay for the goods.

The present case is not so strong for the buyer as the case cited. For here the words, cash upon delivery, are not in the paper, there is nothing as to the time or manner of payment. So that if we should assume that the justice in finding for the plaintiff found in effect that there was no promise on the part of the defendant to accept and pay, and therefore no consideration for the instrument, it would be questionable whether we ought to disturb such conclusion.

But there is another view of the case. It was competent to show by parol what the consideration was and what obligation was, by the bargain as in fact made, upon the defendant. *Chapin v. Dobson*, 78 N. Y. 74; *Eighmie v. Taylor*, 98 Id. 294; *Juilliard v. Chaffee*, 92 Id. 535; *Benjamin on Sales*, § 232, 3d ed.

In this view evidence was given from which the justice had the right to find as a part of the bargain that the plaintiff might draw what buckwheat he had and he would have his pay, without reference to whether the party who owned the rest drew his share. This would not necessarily be inconsistent with the writing, but would relate to the time and manner of payment. If such was the bargain, the

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defendant, after receiving and keeping the plaintiff's share, would not be in a position to assert the entirety of the contract, but would be bound to pay for what he received, and resort to his claim for damages if the balance was not delivered. No damages are shown.

The judgment should be affirmed.

HARDIN, P. J., concurs.

MARTIN, J.—I concur upon the ground that there was no written contract between the parties, and hence it was competent to show the agreement, under which the buckwheat in question was delivered by parol evidence.

In the Matter of the Final Accounting of CORNELIUS SWART
et al., Executors.

Supreme Court, First Department, General Term, July 2, 1889.

1. *Executors. Expenses.*—Expenses for professional services should not be allowed against an estate on the final accounting, without proof of their payment, reasonableness and necessity.
2. *Same.*—Proper expenses of administration and debts are to be paid before legacies, and, in this particular, take precedence of legacies, and when an executor reverses the order of payment, he does so at his peril.
3. *Same.*—Executors, who have acted in good faith, but have, through failure to understand the duties and obligations required of them, improperly administered the estate, and presented an illegal account for adjustment, should not be charged with costs personally.

Appeal from an order and decree of the surrogate.

Maxwell Brothers, for appellants.

Robert J. Sanson, for respondent.

INGALLS, J.—We have given to this case careful consideration, and have reached the conclusion that considering all

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the facts and circumstances involved, that the decree of the surrogate is just and defensible. The executors, from the commencement of their administration of the estate, under the will of Lydia Casey, deceased, seem to have disregarded the duties which the law imposed upon them as such executors, in the proper and orderly management of the estate, and in the distribution of the fund. In some instances legacies which were mere bounties have been paid in full, in preference to debts against the estate. In other instances liabilities have been created by the executors for professional services, and otherwise, and which they sought to have allowed to them in their account against the estate by the surrogate, without proof, either that they were reasonable in amount, or necessary for the protection of the estate. The surrogate was called upon to allow such items, in the face of the fact that the executors had not even paid such claims. It appears that after rejecting the claim of John O. Becker against the estate, that the executors instituted an action against him, and prosecuted the same to a result which was adverse to the estate, and a judgment for costs was entered upon in his favor for \$264.34, October 25th, 1887.

By their own showing, the executors, with a full knowledge of the nature of the action against Mr. Becker, and in which they assumed the risk of a judgment against the estate for costs, proceeded to disburse the funds of the estate by satisfying in full legacies created by the will of Lydia Casey, to the prejudice of claimants who had debts against such estate.

It is a well recognized principle of law that debts and the proper expense of administration are to be first paid, and in that particular they take precedence of legacies, and an executor who reverses the order of payment, does so at his risk. *Nagle v. McGinnis*. 49 How. P. Rep. 193. *Matter of Dorr*, 22 N. Y. State Rep. 124. The decree of the surrogate shows that he carefully examined the accounts of the executors, and has adjusted them in accordance with

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the legal rights of the parties interested in the estate. In doing so he was compelled to disapprove of the manner the executors had manipulated the funds of the estate, and to change the order of preference, which the executors had adopted, and to disallow many of the items contained in their account, some because the indebtedness had been created without authority, and in other instances for the reason that they were excessive in amount. In regard to some of the larger items claimed by the executors, and included in their account, they failed to furnish satisfactory evidence to the surrogate, that it was necessary or proper, to create such indebtedness. And in some instances the claims had not been paid by them, to the parties who had rendered the services upon the retainer of the executors. The decree of the surrogate shows unmistakable evidence that he has patiently and intelligently considered the matter, and has, as far as possible, considered the manner the executors have conducted the administration of the estate, adjusted their account so as to conform to the requirements of the law, and as far as possible, to protect the rights of all concerned. It would seem that the executors, with the amount of legal advice which their account indicates that they sought, would have been able to avoid the entanglement which the history of their administration exhibits. We are convinced that the decree of the surrogate is correct, and should be affirmed, with costs. We are not satisfied that the executors have acted in bad faith, but have rather failed to understand the duties and obligations required of them, and therefore should not be charged with costs, personally.

LEARNED, P. J. and LANDON, J. concur.

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LOUISA C. HOFFKINS, Respondent, v. THE MANHATTAN
RY. Co., Appellant.

Supreme Court, Second Department, General Term, July 2, 1889.

Appeal.—Judgment in favor of the plaintiff will be affirmed by the general term, where there is no evidence of plaintiff's negligence and there is sufficient proof of the negligence of defendant's servants to carry the cause to the jury, in the absence of any question of law.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

Davies & Rappalo, for appellant.

Cornelius E. Kene, for respondent.

DYKMAN, J.—The plaintiff was a passenger upon the defendant's road, and left the cars at Franklin Square station. As she took the second step upon the station platform, she perceived that her dress was caught, and at the same time the train started and she was drawn down and her dress was torn off. Her side was injured and she suffered from nervousness and insomnia. The cause was tried at the circuit and the plaintiff recovered a verdict for \$750.

There was sufficient proof to carry the cause to the jury upon the question of the negligence of the defendant's servants, and the charge of the trial judge was free from error.

There was neither proof nor evidence of any negligence on the part of the plaintiff and we find no merit in the appeal.

The judgment and order denying the motion for a new trial should be affirmed, with costs.

All concur.

JESSIE L. WARD *et al.*, Respondents, v. DEWITT C. LITTLEJOHN, Executor, etc., Appellant.

Supreme Court, Second Department, General Term July 2, 1889.

1. *Bill of particulars. Affidavit.*—A party need not make the affidavit for a bill of particulars, but it may be made by the attorney. It must furnish the requisite proof to warrant the order.
2. *Same.*—Where a bill of particulars is defective, it is sufficient to return it, and demand that a proper or further bill be furnished.
3. *Same.*—The order to furnish a further bill of particulars is in the discretion of the court.
4. *Same.*—Where it may be very material on the trial to know the amounts paid and services rendered by defendant and others set up in the counterclaim, and it is very important that the plaintiff be informed in respect thereto before going to trial, it is almost a matter of course to require a bill of particulars to be furnished.

Appeal from an order for an additional bill of particulars made on the affidavit of one of plaintiff's attorneys.

Lockwood & Hill, for appellant.

George G. & T. Reynolds, for respondents.

PRATT, J.—It was not essential that the affidavit should have been made by a party to the suit. It was only necessary that the affidavit should furnish the requisite proof to require the order to be made. Neither was it necessary to make a new and specific demand for further particulars, it was enough to return the bill already furnished, if it was defective, and demand that the previous order should be complied with and a proper bill furnished, or to demand a further bill. The merits of furnishing a bill of particulars had already been passed upon and acquiesced in by the defendants. The order appealed from, to furnish a further bill, was clearly in the discretion of the judge, and, we think,

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the discretion was properly exercised. *Dwight v. Germania L. Ins. Co.*, 84 N. Y. 493.

According to defendants' theory, it is necessary to try the issue first, whether the plaintiffs are entitled to an accounting, and, if so, adjourn the case or send it to a referee. There is no law that requires a case to be tried by piecemeal.

It may be very material on the trial to know the amounts paid and services rendered by defendant and others set up in the counterclaim, and it is important the plaintiff should be informed in respect thereof before going to trial. It is almost a matter of course to require a bill of particulars in cases like this. *Liscomb v. Agate*, 51 Hun, 291; 4 N. Y. Supp. 167; *Robinson v. Comer*, 13 Hun, 291; *Kelsey v. Sargent*, 100 N. Y. 602; 3 N. E. Rep. 795. This order seems well sustained upon principle and authority, and must be affirmed, with costs and disbursements.

LUKE COX, Appellant, v. ALBANY BREWING Co., Respondent.

Supreme Court, Third Department, General Term, July 6, 1889.

1. *Principal and agent. Authority.*—A person who is permitted by a firm to represent it by hiring, paying and discharging an employee, may be regarded by the latter as the agent of the firm.
2. *Contract. Statute of frauds.*—A verbal contract to work for one year, to begin with the day on which the contract is made, is not within the statute of frauds.

Appeal from a judgment, entered upon a nonsuit directed by the court at the close of plaintiff's testimony upon trial at the circuit.

The action was to recover damages for breach of a contract of employment, alleged by the plaintiff to have been

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made by and between him and the defendant for the plaintiff's personal services for one year, at two dollars per day. The plaintiff served ten weeks and one day and then was discharged, being paid in full for the time of his actual service.

On Saturday, May 7, 1888, the plaintiff received a postal card, signed by the defendant's stamp, stating: "If you come to the brewery we have a position for you." He went to the brewery and into the office of the defendant, and found William Gray there behind the counter alone and apparently in charge. Gray asked him to come to work on Monday following. Rowe, the defendant's superintendent, came in, and also asked him to come. The plaintiff said he would. He went there Monday morning, and Gray asked him to go to the malt house and work there a week, and help the malster show the green hands how to work the malt. It appears that there was a strike among the defendant's regular workmen. The plaintiff at first refused to work in the malt house, saying that he had been there before and the work did not agree with him. He then left the office. Gray followed him out, and said: "Cox, if you will come down to the malt house for two or three days and help Farrell show the green hands how to do the work, I will guarantee you a year's work at two dollars a day." Gray repeated the statement. The plaintiff then said: "I will work until Saturday night and come back Monday." He thereupon went to the malt house and worked there until Saturday night, came back on Monday morning following, when Mr. Gray directed him to go to the shipping room, which he did, and worked there, under the direction of defendant's superintendent, for nine weeks and one day.

Mr. Gray then told the plaintiff that the knights of labor objected to him and he was obliged to lay him off, and directed him to go to the office and get his pay, and he did so. He went there on the following morning to apply for

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work, and said to Mr. Gray : " How is it that you hired me for a year ? " and Mr. Gray told him to get out of the office and not come any more and added : " I suppose you mean to take suit against me."

Chase & Delehanty, for appellant.

De Witt & Spoor, for respondent.

LANDON, J.—The plaintiff was nonsuited. He is therefore entitled to the most favorable inferences of which the testimony admits. He dealt with the person whom the defendant permitted to be its representative in its dealings with the plaintiff, from and including the time of his employment, during the ten weeks and one day of his service, and with and including his payment and discharge. As between the parties, Gray was the ostensible agent of defendant and clothed with all the power he assumed to exercise. Besides there is no intimation in the evidence that his real power was not as ample as his ostensible. The jury might have found that the defendant did employ the plaintiff for one year at two dollars per day.

No question arises under the statute of frauds, for the plaintiff went to work upon the morning of his contract, and the year of his services would expire on the evening before the full year would expire.

The judgment is reversed, a new trial is granted, costs to abide the event.

LEARNED, P. J., and INGALLS, J., concur.

ROBERT HAM, Administrator, etc., Respondent, v. TROY
AND SANDLAKE TURNPIKE, Appellant.

Supreme Court, Third Department, General Term, July 6, 1889.

1. *Negligence. Highway.*—A person is guilty of contributory negligence, if he does not stop when he finds his wagon off the travelled road on an incline.
2. *Same.*—The turnpike company is under no obligation to extend wings across the untravelled part of its road.

Henry A. King, for appellant.

Edgar L. Fursman, for respondent.

LEARNED, P. J.—This is an action to recover for injuries resulting in the death of the plaintiff's intestate. A verdict was rendered for the plaintiff. From the judgment thereon, and from an order denying a motion for a new trial, the defendant appeals.

The deceased with a companion was driving westward along plaintiff's turnpike, was precipitated down an embankment on the south side and was killed. The plaintiff alleges that the defendant was negligent in not maintaining a guard or railing along the side of the traveled way, which is alleged to have been only eighteen feet wide at that place.

Deceased and his companion had started, about four o'clock on Sunday afternoon, March 4th, from Troy in a one-horse wagon, or buggy, for a drive. They stopped at Bloomingdale's and Miller's saloons in Albion, Witbeck's at Wynants Hill, and reached Snyder's lake about dark, or as one witness says about five o'clock. They stayed there three-quarters of an hour, and then started to return. They drove to Sliter's, about a mile and a half, and reached there about twenty minutes of eight.

There is evidence that before they obtained the horse and

wagon at Troy, they had applied to two liverymen and been refused; and there is evidence that one of them was then intoxicated, and both in the opinion of one witness. At some of the saloons mentioned above Benway, the companion of deceased, had drunk whisky. Ham, the deceased, is said to have drunk, but only soda or soda cocktail.

At Sliter's they came into the saloon and called for a soda cocktail. Each drank and then they went out. Sliter saw them, and testifies that he did not consider Ham, the deceased, an intoxicated man. Two witnesses who saw them there say that both were intoxicated. They went out to their wagon, Sliter standing on the stoop and holding a lantern. A boy held the horse, which was headed to the west, the direction of Troy. They got in and Ham took the reins. He told the boy to hold the horse until he could see if the reins were crossed, then said "all right," and they started. The night was starlight.

There had been a flurry of snow that afternoon, which covered the ground, and this enabled witnesses subsequently to follow the tracks of the wagon.

Sliter's was on the north side of the turnpike, and about thirty feet back from the outer line of the same. There was a driveway which turned off from the main traveled road and came up to the stoop of Sliter's, and then returned again to the main traveled road. The deceased had driven on this driveway up to the stoop from the east, and started to go back to the main traveled road. (It should be noticed that some witnesses speak of the direction towards Troy as "west;" others as "north.")

About seventy feet west from the stoop the traveled road is about twenty-six feet wide. At about that point the south, or left wheel of the wagon, had gone off the traveled road, going over what witnesses call the shoulder, that is the edge of the traveled road, and running upon the grass. In this manner, the deceased continued to drive for about 150 feet; the right hand wheel being on the traveled road

and the left hand being on the grass, "striding the shoulder," as expressed by one witness. Somewhere about this place, estimated by one witness at 250 feet from the middle of Sliter's barn (which is about opposite his stoop), the other wheel went off the traveled road. The companion, Benway, thought the horse was all this time running in a rut; thus showing that the wagon was beginning to tip towards the left.

For a considerable distance west of Sliter's (or of Sliter's barn), there is what the witnesses call a shoulder on the south side of the traveled way, for perhaps 225 feet, according to one witness. That is, the traveled way is raised a little above the grass at the side. This grassed part is comparatively level, but gradually grows steeper until at about 300 feet from Sliter's stoop it goes down rather suddenly. Here the road is on an embankment which, on the south side of the road, is some twelve feet high, sloping down to the fence that bounds the highway. And at this point the traveled way along the embankment is, according to the varying testimony, eighteen or twenty feet wide.

After both wheels were south of the traveled road as above stated, the deceased and his companion drove on. Soon the wagon tipped so much that Benway, who had his hands in his pockets, was thrown out. About fifteen or twenty feet further, according to Benway's estimate, the carriage was completely overturned, and Ham was thrown out and killed. This happened about 300 feet from Sliter's stoop and at the place above described, where there was a high embankment.

Now it will be seen from the foregoing statement that before the deceased reached the place of the accident, and for a distance of some sixty feet or more, he was driving quite off the traveled road, on a place growing more steep towards the left, and that his wagon, before the accident, was so much tipped that his companion fell out, and also that almost from his first start from Sliter's his left wheel had been off the traveled road and down on the grass.

The plaintiff claims that the defendants were guilty of negligence because they did not place a fender or railing along the side of the road at the place where the accident happened. Chap. 38, Laws of 1807. This he claims was also a common law duty. *Hyatt v. Rondout*, 44 Barb. 385.

The defendant denies that the act of 1807 is applicable under its charter. Chap. 27, Laws 1822; chap. 95, Laws 1805. And further urges that a railing is only required by these statutes where the road is not of the requisite width, and that at the place in question its road was of the requisite width.

We do not consider it necessary to decide the question whether or not it was the duty of defendant to keep a railing or fender along the side of the road where there was an embankment. If the deceased had been driving along the traveled way, and had come to the place where this embankment was, and if, without negligence on his part, he had gone off the embankment and been killed, it might then have been necessary to inquire whether the defendant had neglected its duty in this respect.

But that is not this case. Railings and fenders are to guard those who are on the traveled road from the danger of falling off. Just as on a bridge over a stream they are intended to guard those crossing the bridge. But the man who, before he reaches the bridge, leaves the traveled road and drives into the stream, does not perish for the want of a fender or railing on the bridge.

The plaintiff urges, however, that defendant should not only have put a railing or fender along the side of the traveled road where it went on the embankment, but that it should also have extended such railing or fender by means of a wing at each end, so as to prevent any one who might carelessly or recklessly drive along the side of the traveled road from going down this declivity.

Perhaps there might be exposed situations where that precaution would be called for. But in *Hubbell v. Yonkers*

(104 N. Y. 434), it was pointed out that it is not negligence not to guard against a contingency, "which never happened before, and which in its character is such as not to naturally occur to prudent men." No evidence has been given of any similar accident before. No evidence that such an accident would naturally occur to a prudent man. The facts show the contrary. A prudent man finding that the left wheel of his wagon was running continuously on ground below that in which his right wheel was running, would suspect that he was off the road and might be in peril. If this position of the wagon increased so that at last his companion fell out, he would know that he was in danger and would stop.

Whatever might have been the duty of defendant as to a fender or railing along the side of the traveled road at the place of the embankment, we have no reason to think from any evidence in the case that they were under any duty to extend wings across the untraveled part of the road. And nothing but such a wing would have prevented the deceased from doing as he did. *Monk v. New Utrecht*, 104 N. Y. 552; 6 N. Y. State Rep. 484.

This point was presented by the defendant in a request to charge which was refused. The evidence, too, in the case does not seem to be in conflict as to the direction and course which the deceased took in driving from Sliter's.

While there may be some variations as to distances, the fact is plain that before the deceased had reached the place of the accident his wagon was entirely off the traveled road, and going directly towards the steep side of the embankment, where it was inevitably upset. Not only, then, the alleged negligence of the defendant did not cause the death of the deceased, but his own negligence contributed to it. He drove off from the traveled road. If he could not see, he could feel, that he was going wrong. A wagon does not travel smoothly when one wheel is on the traveled road and the other over the "shoulder" and down on the grass. His companion, Benway, testifies that the deceased was not

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intoxicated, though he himself was not "strictly sober." If this be so, then at least the deceased was extremely careless or unskilled, and he brought his death on himself.

Judgment and order reversed, new trial granted, costs to abide event.

GEORGE HOTIS, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER R. R. Co., Appellant.

Supreme Court, Third Department, General Term, July 6, 1889.

1. *Master and servant. Appliances.*—Where an employee is injured through a defect in the implements furnished him for his use, knowledge of such defect, in the employer must be shown, or proof of omission to exercise proper care to discover such defect must be given.
2. *Same. Inspection.*—The duty of inspection varies according to the liability of the implement to wear out, and the risk, when impaired, to the employees.
3. *New trial.*—Where the evidence as to the identity of the car is conflicting, and the majority of the witnesses testify that the accident occurred on a car whose brake was not defective, a verdict for plaintiff is contrary to the evidence.
4. *Master and servant. Negligence.*—Where there is nothing to show that a defect in a brake was known to, or could have been discovered by the company, before the accident occurred, the company is not liable for any injury caused to a brakeman in consequence of such defect.

Action by the plaintiff against the defendant for personal injuries received by the plaintiff while a brakeman in defendant's yard at Green Island. He, while in the exercise of his duties, was standing on the roof of a freight car which had just come into the yard from Schenectady, and fell to the ground and was injured. His theory of the case was that the accident was caused by the loosening of the brace connected with the brake which he was testing.

The jury rendered a verdict for plaintiff; and from a

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judgment entered thereon, and from an order denying a motion for a new trial, the defendant appeals.

Hamilton Harris, for appellant.

Edwin Countryman, for respondent.

LEARNED, P. J.—There is no doubt of the general principle that the master owes the servant the duty of furnishing suitable machinery. But this is not an absolute duty; nor is the master an insurer to the servant of the safety of the machinery. It is a duty which is satisfied by the exercise of reasonable care and prudence. Where an injury to an employee results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. *Devlin v. Smith*, 89 N. Y. 470; *Probst v. Delamater*, 100 Id. 272; *Arnold v. Delaware and Hudson Canal Company*, 6 N. Y. State Rep., 368; *Cahill v. Hilton*, 106 N. Y. 512; 11 N. Y. State Rep. 26.

So this same rule was expressed in *Fuller v. Jewett* (80 N. Y. 53), where it is said that the duty of the master is relative, not absolute. He is only bound to exercise due care to that end.

In the case of *Jones v. N. Y. C. and H. R. R. R. Co.* (28 Hun, 284), where the deceased was killed by a fall from a broken rung on a car, the doctrine is again stated. And it may be noticed, that when that case was again before the court, in 28 Hun, 364; affirmed 92 N. Y. 628, the condition of the rung at a time previous to the accident was shown, that the jury might infer therefrom the negligence of the defendant.

Now, in this case, there is no evidence that the brace was off when the plaintiff mounted the car. There is no evidence that it had become loosened before that time. Still less is there evidence that there had been anything in its appearance to attract attention. The brace is held to the

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car by two bolts. A conjecture might be made, that before the accident the bolts had become loose, or the nuts unscrewed, and that the sudden wrench given by plaintiff pulled the brace off. But this would be mere conjecture. The mere fact that the next day it was found on the foot-board, or even the inference that it came off at the time of the accident, is not enough to show defendant's negligence. How it happened that the next day the brace was found on the step, we cannot tell. That may have happened from plaintiff's pulling the brake shaft over in his fall.

Or again, the brace may have become loosened on the way from Schenectady, for there is some evidence that all the cars were in order on the way. At any rate, there is none to the contrary. If this were so, then defendant would have had no notice of the defect, and there would have been no evidence of want of proper care to discover it.

The plaintiff urges that there were two men whose business it was to inspect the cars as they came in, and that such inspection was carelessly performed. But the very circumstances show their duty was not to make a thorough examination of all parts of the car. The train was to be distributed and, as this distribution was to be made, these two men looked at the cars to see if any defect was apparent which should cause them to be sent to the repair shop or to the freight yard.

The testimony is simply that King who is the foreman of the repair shop, having a shop in the freight yard, had two men to look over the cars, one on each side, to inspect the train as it comes into the yard. How thorough an inspection is then to be made does not appear. Whether that inspection was thorough or not, does not determine the question of defendant's negligence, because the question remains, what inspection ought to have been made, under the circumstances, of this particular part of the car? We are not to assume that reasonable care requires that every part of a freight car should be inspected with such and

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such frequency. How often reasonable care requires the brace of a brake shaft to be inspected is a matter upon which nothing is shown in the case. It may be a part of the machinery which seldom wears out or becomes loose, or it may be a part which frequently gets out of order. These and other considerations may enter into the question of negligence. To support his view the plaintiff cites the Vosburgh Case (94 N. Y. 374). That was the case of a bridge improperly constructed in the first place, where defects were obvious to a skilled inspector. The court said that it was not reasonable care to buy an unsafe and defective bridge, and not to have it inspected. There is no proof that this car was originally unsafe.

The plaintiff also cites *Durkin v. Sharp* (88 N. Y. 227). That was the case of injury arising from defect in a track. The court was asked by defendant to charge that it was not liable if the track had been inspected by competent inspectors, and adjudged good. The court refused. And this was held correct. To excuse defendant from paying damages as for an injury by a defect which had been proved, the defendant must show a careful inspection.

If the previous existence of a defective brace had been proved in this case and the defendant had sought to excuse itself on the ground of careful inspection, there would have been some analogy. But the defendant in this case insists that no defect has been shown to have existed for any time; still less for such a time as would charge defendant with notice of it.

And it must be noticed in regard to the matter of inspection that the duty must vary accordingly as the thing to be inspected is more or less liable to wear out and is more or less perilous, when worn, to the employees and others. Railroad companies make a partial inspection of wheels of passenger cars at every stopping place. No one would demand that they should inspect the whole car.

The brace which is claimed to have caused the accident

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is not exposed to much strain or wear. It is the height of the car distant from the place on the brake shaft where the chain is wound. And, therefore, the strain of the brake must be less than it is on the stirrup.

Besides this, it is in full sight of the brakeman, just above his feet, and open to his observation. The plaintiff himself says that he saw this and the other parts of the brake machinery and saw no defect. The case of *Bailey v. Rome, W. and O. R. R. Company* (49 Hun, 377; 19 N. Y. State Rep. 656), it is quite similar to the present; except that in that case, the cause of the accident was proved beyond doubt. In that case the plaintiff was endeavoring to set a brake, when the brake shaft and handle came up in his hands and threw him from the car. It was proved that the pin in the bottom of the brake shaft was gone. But there was no evidence to show when it was broken or lost, or that defendant knew of its absence, or that there was any omission to inspect the car. The court held that there should have been a nonsuit.

We have so far considered this case on the supposition that the brace which held the brake shaft was loose, or perhaps off, when plaintiff took hold of the wheel, and that that circumstance caused his fall. But even this is not satisfactorily proved.

The plaintiff was not trying to set the brake. Hence, there would be no strain, or little strain, on the wheel from the pressure of the brake. He says he pulled on the wheel and it caught a little.

There is no evidence that looseness of the brace would have made the wheel catch. Then he pulled a little harder, and gave a jerk, turned it half way around, and it flew back and he got over-balanced, and the brake shaft went one side. Except the fact that the brake shaft went to one side, there is nothing that we discover in the circumstances which would be caused by the looseness of the brace. The plaintiff says that he does not know whether he put the

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dog into the ratchet, and that, if he did not, the wheel would naturally go back when his hand slipped.

The plaintiff does not know how far the brake shaft went to one side. Now, as that brake shaft was fastened at the stirrup, under the car, and passed through the foot-board about three feet below the top of the car, the wheel at the top of the brake shaft could not move to one side, much more than the excess of the size of hole in the foot-board over the size of the brake shaft. There is no proof how large the hole in the foot-board was. A witness says that it let the brake "wobble." But this hole was not intended to hold the brake shaft; that was done by the brace. So that the fact that the brake shaft would "wobble" in that hole, is no evidence of negligence.

The plaintiff says that the wheel flew back and threw him to the south; and it may be that his claim is that, just at that time, the brace became loose, and thus the wheel flew back and the brake shaft went to the inside, and his hand slipped and he fell. But even that would not account for the catching of the brake shaft which made it necessary for him to give the jerk, that seems to have had something to do with the unfortunate result.

If, however, the brake was off and lying on the foot-board when he mounted upon it, then it would seem to have been difficult for him not to see the defect.

We have thus far examined this case on the assumption that the jury found that plaintiff did not fall from car 3913. We have now to consider the correctness of finding.

It is not disputed that the car from which plaintiff fell was the second car from the engine, as the train came in from the freight yard from Schenectady; and that the first was a coal car. In distributing, the order was reversed, so that the coal car was last.

Chamberlain, a brakeman, had mounted the coal car and saw plaintiff fall. Half an hour afterwards he pointed out the car to Palmer, a brakeman. The next day, about 6 P. M.,

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Palmer testified that he identified the car then standing on the Kelly track unloaded, having contained feed, and saw the brace was loose on the ratchet. He identified the car by the number, which he does not now remember, and by the words "broken track transfer," which, he says, were on this car and others. Lawrence, then a yardman, came up about the time of the accident, and was told which the car was from which plaintiff fell. It was next to the coal car. About forty-five minutes after he was by the Kelly track, and saw a car which he identified by its general appearance as that from which plaintiff fell. He saw a brakeman try the brake and it was loose. This constitutes the plaintiff's evidence on this point. On defendant's part Kelderhouse, the rear brakeman on the train, saw plaintiff fall, and states that the number of the car was 3913, and that the brake was in order. Gleason the conductor of the train, states that the number of the car was 3913, and produces his original report made the day of the accident, showing this number. McIntosh, the head brakeman of the train, testifies that the brakes of the first five cars were in good order, and that he left the three head brakes set, which would include the car from which plaintiff fell. Flood, a car repairer, testifies that he repaired 3913, and it was in good order July 14, 1883. Harmon, an assistant yard master, testifies that the car next to the coal car was marked "King." King testifies that he was foreman of car repairs; that he was at the yard the next morning. Car 3913 was on repair (on Barney) track, boarded with material for him; that the brake was in good order. Cox, an inspector, testifies to the same as to this car, though he does not remember the number.

This is a brief statement of the testimony. It will be seen that Lawrence only identifies the car by general appearance; Palmer by the number (now forgotten), and by marks which were common to this and other cars.

On the other hand the testimony and the record of the

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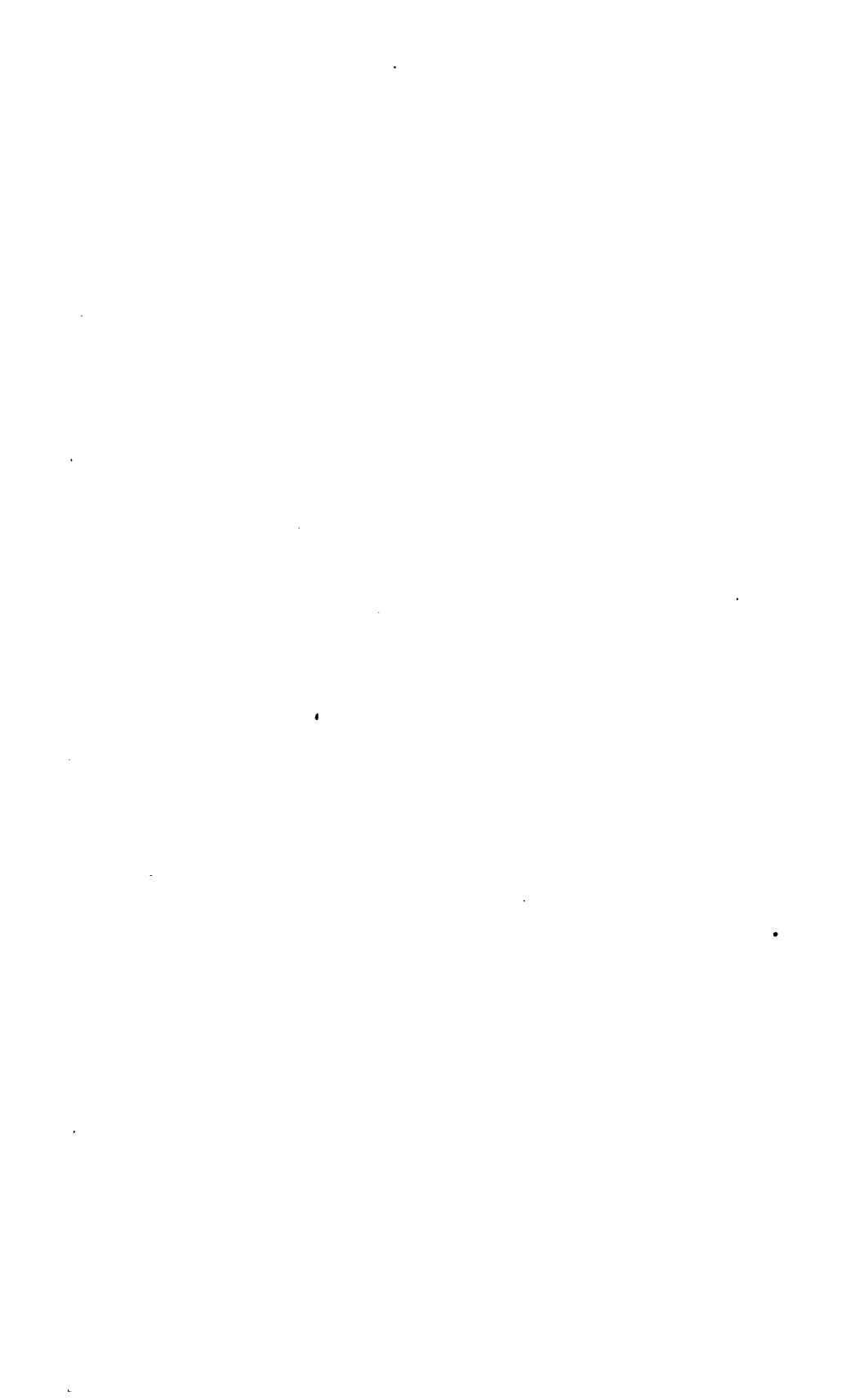
conductor, Gleason, and the testimony of Kilderhouse, which is less valuable, establishes the number of the second car. McIntosh proves that the brakes of the first five cars were in good order, and that, after getting into the yard, he left the three head brakes set. Harmon testifies that the second car was marked King; and King finds car 3913 on the Barney track for him the next morning.

On the whole, we think that on this point of the identity of the car, the verdict is against the weight of evidence. On the first point discussed, we are of opinion that no negligence on the part of defendant was shown.

Judgment and order reversed, new trial granted, costs to abide event.

INGALLS, J., concurs.

LANDON, J.—I concur, and add that the employee who makes inspection incurs the risks of the employment, to the extent of the danger resulting from the defects which his inspection is intended to detect and provide against.



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8. A finding of a referee cannot be set aside upon the ground of probabilities; the evidence must disclose a reasonable certainty of error in the court below, before a result upon a question of fact can be disturbed. It is not sufficient to justify such action that, if the case had been originally submitted to the appellate court for decision upon the record, it would have come to a different conclusion. *Id.*
 9. *Referee.*—The refusal of a referee to respond to a request to find is not a ground for reversal, unless such refusal is prejudicial to the appellant. In view of an adverse finding upon the only question involved in the case, the referee's refusal to find requests, though sustained by the evidence, is harmless. *Woodman v. Penfield*, 246.
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 20. *Relief.*—Where no amendment was asked for in the court below, nor any motion for a new trial, based upon the ground of surprise, made, relief from a judgment obtained through inadvertence of the

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23. The appellate court will not disturb a verdict and judgment, where there is no question of law involved, and the testimony is abundantly sufficient to sustain them. *Lobhardt v. Gilbert*, 510.
24. *From justice's court.*—Where objections to the drawing and organizing of the jury in justice's court are merely technical, and do not involve or affect the merits, the county court, upon an appeal on questions of law only, may give judgment according to the right of the case, without regard to technical errors. *Purdy v. Dinkle*, 514.
25. *Dismissal of Complaint.*—In an action for malicious prosecution, the credibility of the testimony of defendant and his agent is a question for the jury, and it is error to dismiss the complaint, as matter of law, on their testimony; especially, where there is a denial by plaintiff of the offense with which he was charged, and also the undisputed fact that he was tried and acquitted on that charge. *Gierhon v. Ludlow*, 518.
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31. *Objections.*—The parties are presumed to know what the law is, even though the court does not; and it is the duty of the party, when an assignment is offered in evidence, to make such objections to its introduction as he intends to rely upon, and all other objections are then and there waived. *Id.*
32. Where the assignment is eminently just and proper, and under the judgment the property will be equally divided, but if it is reversed, the assigned property will be diverted from an equal distribution among the creditors, a motion for a re-argument based upon a point not raised either on the trial, or on the appeal, should not be granted. *Id.*
33. Judgment in favor of the plaintiff will be affirmed by the general term, where there is no evidence of plaintiff's negligence and there is sufficient proof of the negligence of defendant's servants to carry the cause to the jury, in the absence of any question of

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ARREST.

1. *Agent.* Section 549.—The complaint, in order to justify an arrest in an action against an agent, must contain a specific allegation that the money or property, for the misappropriation of which the action is brought, was received by such agent in a fiduciary capacity. *Bartlett v. Sutorius*, 23.

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2. *Vacating.*—An application to vacate an order of arrest founded on facts not extrinsic to the cause of action, is to be disposed of according to the just preponderance of proof as contained in the affidavits read on such motion, and a decision as to defendant's liability to arrest ought not to be postponed until the trial. *Bailey v. Prince*, 151.

3. *Same.*—In case of an arrest on the ground that the defendant has removed or disposed of his property with intent to defraud his creditors, a motion to vacate the order of arrest is properly refused, where it appears that a chattel mortgage given by defendant to his brother was foreclosed under very suspicious circumstances, and no statement from the purchaser at the foreclosure sale, showing the good faith of the transaction, is presented. *Id.*

4. *Private person.*—A person, not an officer, is authorized by law to arrest a party for a crime committed in his presence, upon immediate pursuit. *People v. Morehouse*, 241.

5. *Assault.*—The fact that defendant raised a gun to his shoulder, cocked, pointed it towards a person and threatened to shoot him if he came any further, constitutes a crime, for which a private person, if done in his presence, has

a right to arrest the defendant, if he proceeds promptly. *Id.*

6. *Fraud.*—A person, who wrongfully obtains personal property from another party, contracts a debt within the meaning of section 549 of the Code, and may, under subdivision 4 of this section, be arrested in an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the indebtedness. *Valentine v. Richardt*, 579.

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1. *When sufficient.*—An assignment, which recites the transfer and consideration in general terms, is sufficient to carry the claim to the assignee, even though no actual consideration was paid therefor by him to the assignor; the legal title is sufficient to enable him to maintain an action. *Deach v. Perry*, 99.
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ATTACHMENT.

1. *Affidavit.*—An affidavit on personal knowledge, where the affiant, not a party, fails to state the facts which tend to show such personal knowledge, is insufficient to procure an attachment. *McVicker v. Campanini*, 238.
2. Where an affiant does not necessarily have knowledge, and

where he cannot be presumed to know the several facts attempted to be established by his affidavit, such affidavit furnishes no legal evidence of their existence. *Id.*

3. *Same. Information and belief.*—

If the affidavit is made upon information and belief, the sources of the information and the grounds of the belief must be stated; and if the information is acquired from another person, his affidavit must be furnished as the legal evidence of the fact, or its non-production excused by showing the impossibility of obtaining it. *Id.*

4. *Same. Office of affidavit.*—The office of an affidavit is to furnish evidence; and, unless the affidavit contains legal evidence conferring jurisdiction upon the court, and it appears upon the face of the affidavit that the court had jurisdiction, an order based upon such an affidavit will be set aside. *Id.*

5. *Vacating.*—The attaching party, where the moving party, on a motion to vacate an attachment, does not confine the facts alleged in his affidavit to the mere formal parts of the motion, but introduces new matter, will be allowed to read affidavits in support of the order. *Buell v. Van Camp*, 379.

6. *Vacation.*—An attachment will be vacated, where the answering affidavits meet and answer fully the case made by the original papers. *N. & W. G. L. Co., v. Tappen Zee Hotel Co.*, 567.

7. So, an attachment, on the ground that defendant is about to remove his property from the state, will be vacated, where the removal was openly made, and the goods were removed from the state, while they were in transit to the city of New York for storage and safekeeping, and the circumstances of suspicion, upon which the attachment was granted, have been satisfactorily explained; but where some apparent grounds existed, it must be done upon condition that no action be brought upon the undertaking. *Id.*

8. *Sufficiency of affidavit.*—The affidavit in this case was held to contain a sufficient statement of facts to give a justice of the peace jurisdiction to issue an attachment. *Riley v. Skidmore*, 573.

9. *Abuse of process.*—There is no abuse of process, where the property attached is insufficient to satisfy the execution. *Id.*

10. *Undertaking. Amendment.*—A justice of the peace has power to permit an amended undertaking to be filled *nunc pro tunc* in attachment proceedings. *Id.*

ATTORNEY AND CLIENT.

1. *Compensation.*—Neither section seventy-three of the Code, nor section 6, 3 R. S., page 970, prohibits an agreement to give an attorney a certain share of the proceeds for his services in collecting a claim. *Chester v. Jewel*, 159.

2. The attorney, under such a contract, is entitled to a like share in the increase in value of the property. *Id.*

3. *Attorney's lien.*—An attorney has a lien for his services to the extent of his interest, upon the cause of action of his client. *Id.*

4. *Mortgage security.*—It is no objection to the allowance of a certain sum, for services rendered at the attorney's request in relation to the property, from his share, that it was secured by a mortgage on his interest, nor need such mortgage be filed. *Id.*

5. *Contract to bear expenses.*—An agreement by an attorney to take measures for the recovery of property for his clients, for an interest in what should, by his efforts, be realized, and, for this purpose, to make expenditures and disbursements required for the recovery of the property by suit, when entered into in good faith, will be permitted and sanctioned. *Id.*

6. A deed given by an aged client to her lawyer, under an unjust and

unequitable agreement, will be set aside. *Gallup v. Henderson*, 519.

See APPEALS, 10.

BENEFIT SOCIETIES.

1. *Substitution*.—In order to entitle a substituted beneficiary to the benefit, there must be a complete substitution of beneficiaries in the form prescribed by the constitution and by-laws of the association; and, if anything remains to be done in order to complete the transaction according to such constitution and by-laws at the time of the death of the insured, there has been no substitution, and the original certificate still remains in force. *Luhrs v. Luhrs*, 199.
2. The new certificate must be completely issued by the association, and accepted by the assured, before his death. *Id.*
3. *Defense*.—A member of a mutual benefit association upon whom a notice of assessment is served, has a right to presume that he has the usual time to pay the assessment; and his failure to pay within a shorter period is no defense in an action, after his decease, on his certificate. *Knight v. Supreme Council*, etc., 453.
4. No defense for non-payment is available, where there remain, in the association's hands, funds of deceased sufficient to pay the assessment. *Id.*

BILL OF PARTICULARS.

1. *Affidavit*.—A party need not make the affidavit for a bill of particulars, but it may be made by the attorney. It must furnish the requisite proof to warrant the order. *Ward v. Littlejohn*, 589.
2. Where a bill of particulars is defective, it is sufficient to return it, and demand that a proper or further bill be furnished. *Id.*
3. The order to furnish a bill of particulars is in the discretion of the court. *Id.*
4. Where it may be very material

on the trial to know the amounts paid and services rendered by defendant and others set up in the counterclaim, and it is very important that the plaintiff be informed in respect thereto before going to trial, it is almost a matter of course to require a bill of particulars to be furnished. *Id.*

BILLS, NOTES, AND CHECKS.

1. *Consideration*.—The signature of a decedent to a note presumably constitutes a consideration. *Hawzhurst v. Ritch*, 499.
2. A note given for an amount ascertained to be due the payee by reason of the maker's selling, without the former's notice and permission, personal property belonging to him, is founded upon a sufficient consideration. *Id.*
3. *Evidence. Burden of proof*.—A statement in a note that it was given "for value received," is sufficient to throw upon the administrator the burden of proving that it was *nudum pactum*. *Id.*

BOARDS OF HEALTH.

Laws of 1885, chap. 270.—The boards of health in the several towns of this state were continued in existence by Chap. 270 of Laws of 1885, and can exercise the powers and are subject to the duties specified in section 3 of said act, until their successors shall be elected as therein provided. *Board of Health, etc., v. Cease*, 80.

BROKERS.

Commissions.—Where, in an action by a broker for commissions for selling a house, he testified that defendant orally agreed to sell the house for a certain sum, and to pay him commissions on the sale, but defendant denied the agreement, and her testimony was corroborated by two disinterested witnesses; and it further appeared that, on the day after the alleged agreement, the defendant refused to sign a written contract of sale,

and thereupon the plaintiff wrote her for a definite answer in regard to the sale, the evidence was held insufficient to establish the agreement and sustain a verdict for plaintiff, and the verdict was set aside and a new trial granted. *Martin v. Bliss*, 155.

BROOKLYN.

Boiler inspection.—The act of 1873, which gives to the board of police and excise of the city of Brooklyn power to inspect steam boilers, was not repealed by the general act of 1874. Boilers, which have been inspected and duly certified by an insurance company, are not exempt from inspection under the former act. *Higgins v. Bell*, 506.

BURDEN OF PROOF.

BILLS, NOTES AND CHECKS, 3.
INSURANCE, 8,

CASE.

APPEALS, 28.
REFERRER, 1.

CHARGE.

TRIAL, 1, 2, 6.

CONFESSION.

JUDGMENT, 3.

CONTRACT.

1. *Promise to pay.*—Wherever a promise to pay money out of property, to be received from a decedent's estate, in execution of his request, has been enforced, it has been made by a person who, by descent, devise or bequest, has received from the decedent property out of which the proposed devise or legacy would have come, and has prevented the making of such proposed devise or legacy; the mere proof that the promise to pay has been made is not suffi-

cient to justify a recovery. *Crippen v. Crippen*, 301.

2. In order to sustain a claim that a husband has obtained title to his wife's property by reason of a promise to her that her money should go to her children after her death, without a will, it must be shown that he, by virtue of such promise, obtained from his wife's estate money which she otherwise would have given to them. *Id.*

3. Where the personal property of a wife came to her from her father in 1845, and there was no evidence that her husband had not reduced it to possession, or held it in trust for her, there is not sufficient proof to show that he obtained any property from her by his promise that would otherwise have gone to her children, and a claim of her son against the estate of her husband was properly rejected. *Id.*

NOTE ON PROMISE BY ONE TO ANOTHER FOR THE BENEFIT OF A THIRD PERSON, 303.

4. *Performance.*—Where the memorandum of sale of real property states that the deed was to be given at any time on payment of \$1,000 by plaintiffs, the time can be made certain by defendants' tendering a deed and demanding payment of the purchase money. *Lee v. Briggs*, 535.

5. *Evidence.*—Any uncertainty in a contract in the description of the property therein to be conveyed can be remedied by parol evidence. *Id.*

6. *Statute of frauds.*—A verbal contract to work for one year, to begin with the day on which the contract is made, is not within the statute of frauds. *Coz v. Albany Brewing Co.*, 590.

CONVERSION.

DAMAGES, 1.

CORPORATIONS.

1. *When a stockholder may sue.*—An individual stockholder has a

right to sue in his own name to enforce a cause of action growing out of the alleged misconduct of the directors or managing stockholders, upon a refusal of the corporation to assert its rights, or upon circumstances showing that any attempt to get it to do so will be ineffectual, where it is friendly rather than hostile to the defendants, and will not enforce the rights which he seeks to assert in his action. *Averill v. Barber*, 40.

2. *Accounting*.—Where the directors have acquired certain patents in their own names, which should have been taken in the name of the corporation, and transfer them to another corporation, a decree that such directors account and pay over all profits realized by them from the patents to the receiver, is proper. *Id.*

3. The assignee company, if it acquired the patents from the directors, who held the legal title, without notice of any equity existing in behalf of the former corporation, cannot be made to account for profits which it has realized from the use of the patents. *Id.*

NOTE ON RIGHT OF BENEFICIARY
TO BRING AND MAINTAIN SUIT,
53.

4. *Offer of judgment*.—An offer of judgment made by a corporation in contemplation of insolvency, or with the view to giving the plaintiff a fraudulent preference, falls within the prohibition of the statute, and is void as to its creditors. *Braem v. Mer. Nat. Bk.*, 84.

5. But in case there is an agreement between the company and plaintiff to give him security for an existing debt on demand, and the judgment is given in compliance with such agreement, the fact of the corporation's insolvency at the time does not furnish controlling evidence that such offer of judgment was made in contemplation of insolvency, and the question is one of fact for the jury. *Id.*

6. *Remedy of creditor*.—A judgment creditor cannot maintain an action

at law against another judgment creditor for damages for issuing an execution upon his judgment before the former had any interest in the property, nor for afterwards receiving from the sheriff the amount of such judgment, though the judgment would have been held invalid and set aside in a proper action or proceeding for that purpose. *Id.*

7. *Summons. Service of*.—Where the service of a summons and complaint is made upon a foreign corporation, by delivering a copy thereof to the managing agent of the company, the papers must show that the defendant has some property within the state at the time of the service, from which the plaintiff may have some chance of benefit. This is sufficiently established by proof that the defendant is the lessee of the office where its business is carried on, and owns the office furniture therein. *Tuchband v. C. & A. R. R. Co.*, 352.

8. *Same. Managing agent*.—A person who is described in the tables of a foreign railway corporation as "general agent" is a managing agent of the company within the meaning of the provisions of subd. 3 of section 432 of the Code. *Id.*

9. *Insolvency*.—Any arrangement made between the officers and agents of a corporation, when insolvent, or in contemplation of insolvency, and various creditors, who were aware of its condition, with a view of transferring any of its property or assets, is utterly void. *Varnum v. Hart*, 478.

10. Section 4, title 4, part 1, chap. 18, Revised Statutes, does not guide, regulate or prohibit creditors from resorting to the customary remedies of the law, though they have knowledge of the insolvency of the corporation. *Id.*

11. *Creditors*.—Where creditors of an insolvent corporation sold its assets on void judgments, under an agreement to apply the proceeds *pro rata* on their judgments, they are jointly liable for the value of the property. *Id.*

12. *Estoppel*.—Where a receiver of the insolvent incorporation, on being appointed, converted the assets into money and advertised for claims, and the judgment creditors in question respectively presented as a claim the balance due on their several judgments, which were passed by the referee, appointed to examine the account; and where, in the order confirming the report, it was adjudged that the account of the receiver be settled, allowed and confirmed as therein stated, that he pay over the money *pro rata* to the several parties, and that he be continued in office for the purpose of bringing such further actions and proceedings, as he shall be advised, the right of the judgment creditors to retain the money realized by them on the sale of the property, was not involved or litigated in the proceedings, nor was there an adjudication upon the validity of the creditors' judgments, so as to estop the receiver from afterwards maintaining an action to recover the amount realized by the creditors from the execution sale. *Id*.

COSTS.

1. *Section 3234*.—The defendant, in an action of replevin in which the complaint sets forth but a single cause of action, is not entitled to costs, where he recovers a portion, and the plaintiff the rest, of the chattels. *Ackerman v. O'Gorman*, 109.

2. A complaint in replevin does not set forth two or more causes of action, though the goods, claimed to have been wrongfully taken and detained, were sold at different times and delivered at different places. *Id*.

NOTE ON THE RIGHT OF DEFENDANT TO COSTS, WHERE THERE ARE SEVERAL ISSUES OF FACT, 112.

3. *Additional allowance*.—Additional allowances of costs, where the litigation principally arose out of the contest of the defendants *inter sese*, are properly charged against moneys belonging to them. *Chester v. Junel*, 181.

4. Where the suit is brought for the benefit of all the parties to it, in order to secure a settlement of their rights before a distribution of the fund or property should be made, an allowance of costs to plaintiff, in a difficult and extraordinary action, is proper. *Id*.

5. *Security for*.—Where the amount of security for costs previously filed by plaintiff will not be sufficient to indemnify defendant against costs, the appellate court will not interfere with the exercise of the special term's discretion in requiring additional security to be given, even though the plaintiff has recovered a verdict for a large amount, where the trial court has ordered the defendant's exceptions heard at the first instance at the general term. *Reck v. Phoenix Ins. Co.*, 342.

6. *Discretionary*.—The referee's report cannot be added unto, by way of costs, by the judgment, where the referee fails to award costs in cases where they are discretionary. *Coddington v. Bowen*, 417.

See EXECUTORS, 2.
JUDGMENT, 1.

CRIMINAL LAW.

Validity of sentence.—A sentence for assault in the third degree, imposing imprisonment for one year and a fine of \$250, and directing defendant to be imprisoned not to exceed one day for each dollar of said fine, etc., is in accordance with the Code. When the defendant has served out the term of his imprisonment, he can apply for a *habeas corpus*, and test the question upon that part of the sentence which imposes the fine, but he can have no relief until that time. *People v. Sutton*, 575.

DAMAGES.

1. *Conversion of stock*.—In an action for the conversion of stock, a verdict for twenty-five dollars per share is not excessive, where the defendant admitted that he had sold some of this kind of stock at some time for \$200 per share, and

a witness testified that he had sold to defendant, subsequently to the alleged conversion, a lot of this stock for \$55 per share. *Brown v. Lawton*, 37.

2. *When a question for the jury.*—Where the testimony raises the question as to the extent, nature and permanency of plaintiff's injuries, what is a suitable sum to compensate him for such injuries is a question of fact, to be fairly and cautiously submitted to the jury. *Cleveland & N. J. Steamboat Co.*, 93.

See INSURANCE, 7.

DEBTOR AND CREDITOR.

CORPORATIONS, 5.

DEFENSE.

MUNICIPAL CORPORATIONS, 9.

TRIAL, 5.

DEPOSITIONS.

1. *Examination before trial.*—Where neither the fact that the plaintiff has reason to apprehend that he cannot have the examination of the defendant at the trial, nor the fact that it is important for him to have such testimony before trial, appears in the affidavit upon which the application is founded, the examination of the defendant before trial should not be allowed. *Chaskel v. Met. El. R. R. Co.*, 36.
2. *Same. When vacated.*—The plaintiff should be relegated to the minutes of the corporation for his proof as to whether defendant was, or was not, a director thereof, and unless it appears that there are no such minutes, he should not be permitted to harass the defendant unnecessarily by an order for his examination; and such order should be vacated. *Id.*
3. *Where set aside.*—Where the testimony of a witness, taken by commission, was given under written memoranda or directions sent to him on behalf of a party before

the deposition was taken, it furnishes sufficient ground to suppress the deposition, if the application is made before the trial; and when such fact is made to appear at the trial, the trial judge has power to suppress the deposition. *Nordlinger v. Anderson*, 334.

4. *Affidavit.*—An affidavit for an examination of a party before trial should be made by a person who knows the facts, or a reason assigned why it is not so made. *Cross v. Nat. F. Ins. Co.*, 443.
5. *Bad faith.*—The refusal by an insurance company to receive the proofs of loss furnished by the insured, where all the information sought to be obtained by the examination can be found in such proofs, is an indication that the application was made for purposes of delay and not in good faith. *Id.*
6. *Record.*—Where the information sought by the examination can easily be ascertained by an inspection of the records of the county clerk's office, the order for the examination will be vacated. *Id.*

EQUITY.

JUDGMENT, 5.

EVIDENCE.

1. *Explanation.*—A witness may be allowed, on redirect examination, to explain a remark made by one of the parties in a conversation with him which was properly drawn out in the witness' cross-examination, by giving the whole of the conversation, in order to prevent or rebut any adverse or damaging inferences. *Graves v. Santwa*, 67.
2. *Expert witness.*—It is the province of the trial judge to determine whether a witness is qualified to speak as an expert. *Id.*
3. *Rebuttal.*—In an action for malpractice brought against a surgeon, where several witnesses have been called by him in defense, to vindicate the operation, and he him-

self, as a witness, has minutely stated the condition in which he found the parts before and during his operation, it is proper to permit the plaintiff to introduce, in rebuttal, expert testimony to show that the operation was unnecessary. *Id.*

NOTE ON THE ADMISSIBILITY AND EFFECT OF THE WHOLE OF A STATEMENT IN EVIDENCE, 74.

4. *Earnings*.—Under an averment in the complaint, in an action to recover for personal injuries received through defendant's negligence, that plaintiff has been, and will be, for a long time to come, unable to labor, etc., the amount of wages he was earning at the time of his injuries, and the fact that he had not been able to labor thereafter, are properly received in evidence. *Cleveland v. N. J. Steamboat Co.*, 93.

5. In an action for specific performance, a conversation between defendant's agent, who negotiated the contract, and a proposed purchaser of one of the houses which plaintiff was to convey to defendant, in the absence of plaintiff, is entirely competent for the purpose of showing the circumstances under which the contract with such purchaser was made, and the inducements which led thereto, as a part and parcel of the whole transaction. *Lennon v. Stiles*, 145.

6. So also, evidence showing the condition and circumstances under which the contract was to be delivered, and what was said to induce defendant to sign it, is competent. *Id.*

7. *False imprisonment*.—In an action for false imprisonment on a charge of larceny, the evidence of the physical condition of plaintiff's brother, who was arrested with him, is competent to show that the defendant's servants had no reasonable grounds to believe that he and his companion have been guilty of theft. *Fitzpatrick v. N. Y. & M. R. R. Co.*, 192.

8. Evidence to show that the defendant had the control and manage-

ment of the premises on which the arrest was committed, is proper. *Id.*

9. The refusal to permit a witness to testify as to the description of the thief given by the complainant to him, where no such question was submitted to the jury, is not error. *Id.*

10. *Parol*.—An agreement entered into, in good faith, for the purpose of defining and fixing the relations between the parties, where it does define and fix them, expresses the true relations of the parties, and the previous negotiations and relations of the parties are immaterial. *Masterlon v. Boyce*, 205.

11. Loose expressions in letters cannot change the exact and clear language of agreements. *Id.*

12. In an action brought by the heirs at law to set aside a conveyance of property made by the deceased grantor, on the ground of fraud and undue influence exercised by the grantee, it is competent for a witness, who had known the deceased grantor and had business dealings with him for six years, and up to two years of the time of the execution of the deed, to state whether the decedent took part in certain conversations to which his testimony had been directed. This was strictly and exclusively a matter of fact. *Yeandle v. Yeandle*, 234.

13. *Matter of fact*.—So whether the witness had observed any difference in the grantor's manner, or his disposition to talk about business, is a fact, and its exclusion was error. *Id.*

14. A witness may, after giving the details, characterize the act or conversation of a testator or grantor as rational or irrational. *Id.*

15. *Memoranda*.—The admission in evidence of an inventory, made by the witness at the time of the transaction, on proof that it was then correct, is proper. *Woodman v. Penfield*, 246.

16. *Intent*.—In an action for con-

- version against a sheriff for a levy and sale of property claimed by plaintiff on an execution against her husband, they may testify that, in the sale and transfer by him to her, they had no intent to hinder, delay or defraud creditors. *Id.*
17. *Special damage.*—Where special damages are not alleged in the complaint, proof, against specific objection, that the plaintiff was prevented, by the disability which the accident produced, from carrying on his business, is incompetent on the trial of an action for personal injuries on the ground of negligence. *Saffer v. D. D. E. B. etc., R. Co.*, 343.
18. *Speed.*—In such an action, the plaintiff has the right to resort to proof as to the rate the defendant's cars were propelled in passing curves, in order to meet the defense that its cars never passed over a curve in the manner described by him. *Id.*
19. *Affidavit.*—An *ex parte* affidavit of one of the defendants in an action, containing an admission of facts and circumstances material and pertinent to the issue between himself and plaintiff, is competent as against him, but not as against the other defendants. *Varnum v. Hart*, 478.
20. The admission of incompetent evidence, without objection or motion to strike out, is not error. *Id.*
21. *Agency.*—Parol evidence of private instructions given by the defendant to his agent, not reported to the plaintiff, is inadmissible to vary a written contract. *Farrell v. Perkins*, 513.
22. *Physician.*—In an action for personal injuries, the admission of testimony of a physician as to whether the plaintiff can walk without a cane, is within the discretion of the trial court, especially under a general objection. *Johnson v. B. & S. Ave. R. R. Co.*, 532.
23. *Expert.*—Testimony of an expert witness, as to whether plaintiff will recover, is proper. *Id.*
24. *Leading questions.*—Leading questions are always discretionary. *Id.*
25. *Negligence.*—In an action on the ground of negligence for injuries sustained by reason of being struck by defendant's train, while plaintiff's foot was caught and held between one of the rails and a guard rail, the plaintiff may show how the track and guard rail were constructed at the place of the accident, and the construction of other guard rails, so that the jury can determine whether the guard rail at the place of the accident was properly constructed. *McKinney v. Long Island R. R. Co.*, 543.

See CONTRACTS,

INSURANCE, 6.

SALES, 2

WILLS, 9, 13, 14, 23, 24.

EXECUTION.

Where the sale was made on both valid and invalid executions, under the agreement to share *pro rata* in the proceeds, and the valid executions are prior liens and of greater amount than the whole of the corporate property sold, the presence of the invalid executions do not render the judgment creditors therein liable. *Varnum v. Hart*, 478.

EXECUTORS.

1. *Final accounting.*—The amount paid by the administrator to his attorney for obtaining the money which constitutes the whole estate, if a reasonable sum, should be allowed to him, on the final settlement of his accounts. *Matter of Laramie*, 539.
2. *Power of surrogate.*—The power to determine who are the proper distributees is inherent to the power to settle, account and distribute the estate; and in such case, the surrogate's court has

power to determine the question of the legitimacy of the distributees. *Id.*

3. *Costs*.—Where, on such settlement, a contest between a legitimate child, and other illegitimate children, of the decedent, was set in motion by the administrator, who, in good faith, presented the question to the surrogate's court, the costs of a special guardian appointed for all the children, and of the attorney for the legitimate child, should not be charged against the administrator's share in the estate, but should be paid out of the share of the legitimate child. *Id.*

4. *Expenses*.—Expenses for professional services should not be allowed against an estate on the final accounting, without proof of their payment, reasonableness and necessity. *Matter of Swart*, 585.

5. Proper expenses of administration and debts are to be paid before legacies, and, in this particular, take precedence of legacies, and when an executor reverses the order of payment, he does so at his peril. *Id.*

6. Executors, who have acted in good faith, but have, through failure to understand the duties and obligations required of them, improperly administered the estate, and presented an illegal account for adjustment, should not be charged with costs personally. *Id.*

FALSE IMPRISONMENT.

When arrest justified.—Where the plaintiff obtained a horse and wagon from a boy in charge of defendant's livery stable, at an early hour in the morning, on the representation that he was a regular customer at the stable, which statement was untrue, and that he would return about nine o'clock that day; but he did not give his name, the horse and wagon did not return, and the defendant procured a warrant for his arrest; and the plaintiff attempted to escape, after he had notice that a warrant had been issued; and when taken

before the magistrate, he pleaded guilty, paid his fine and was discharged; the facts justified the arrest and an action for false imprisonment cannot be maintained. *Olmstead v. Dolen*, 561.

See EVIDENCE, 7, 8, 9.

FORECLOSURE.

MORTGAGES, 2, 3, 5.

GUARANTY.

PARTNERSHIP, 1, 2.

HIGHWAYS.

NEGLIGENCE, 10, 11.

QUESTION OF FACT, 3, 4.

HUSBAND AND WIFE.

1. A transfer of personal property from husband to wife is valid, when made in good faith and based upon a sufficient consideration. *Woodman v. Penfield*, 246.

NOTE ON CAPACITY OF HUSBAND AND WIFE TO CONTRACT WITH, AND TO SUE, EACH OTHER, 249.

2. *Employment*.—While the husband and wife are acting in good faith, and not to defraud creditors, she may employ him to conduct her business affairs, and the profits inure to her, and not to his, benefit. *Coddington v. Bowen*, 417.

3. *Liability*.—A married woman is liable for work and materials furnished at her husband's request, if applied to her property in her presence and without objection; and the law will imply a promise to pay for the materials furnished and services performed on her separate property. *Mackey v. Webb*, 421.

NOTE ON THE RIGHT OF A MARRIED WOMAN TO COLLECT FOR SERVICES RENDERED FOR, OR IN THE FAMILY OF, HER HUSBAND, 423.

INFANTS.

1. *Sale of infant's real estate. Jurisdiction.*—In proceedings for the sale of an infant's real estate, the court does not possess any jurisdiction whatever to construe a will, and determine the question, or allow a special guardian to ascertain, what interest the infant has, under the will, in the real estate, or whether or not it is in a condition to be sold under statutory proceedings. *Armstrong v. Weinstein*, 61.
2. *Same. Specific performance.*—The court cannot make a title open to a reasonable doubt a marketable one by passing upon an objection depending on a disputed question of fact or a doubtful question of law in the absence of the party in whom the outstanding right is vested, and will not compel a purchaser in proceedings to sell an infant's real estate to take a title based upon the question of an implied power of sale, where no adjudication binding upon the infant has been had. *Id.*

INJUNCTION.

1. *Right of way.*—Where a right of way is conveyed by a deed, to be used by the parties in common, and not to be incumbered or built upon by either party, a building extending upon said right of way is a breach of said covenant, and the granting of an injunction to enforce the covenant not to build is a proper exercise of the discretion of the court. *Dexter v. Beard*, 106.
2. *Personal service.*—Where an injunction, restraining all creditors from further prosecution against stockholders, is granted, it is not necessary to serve the injunction order personally upon the plaintiffs, but it is sufficient, for the purposes of the motion to postpone the trial of the actions, that the creditors or their attorneys have knowledge of its existence; and the only way in which they could rid themselves of the effect of the injunction in the omnibus suit was to seek its dissolution therein so far as they were concerned. *Watson v. Coe*, 339.

3. The fact that the motion to set aside the injunction is not decided within twenty days after it was submitted for decision, does not affect the validity of its disposition. *Id.*

INSANE PERSONS.

Lunacy proceedings.—Upon a return of the commission on an inquiry of lunacy, § 2336 of the Code calls upon the court, before which the proceeding is pending, for the exercise of its discretion; and the conclusion of the county judge, in such case, where the evidence raises a question for the consideration of the jury, ought not to be reversed, for the reason that it rested, to a very large extent at least, in the discretion imposed upon him by law. *Matter of Abbey*, 420.

INSURANCE.

1. *Cancellation of policy.*—Where the insured, through his agent, forwards his policy to the agent of the company, with the direct request that it be cancelled, and a suggestion that it be allowed a *pro rata* rebate of premium, the cancellation is effected, though the company has not accepted the policy nor repaid the premium. *Crown Point Iron Co. v. Aetna Ins. Co.*, 15.
2. *When effected.*—The mailing of the policy by plaintiff's agent to the agent of the company for the purpose of cancellation, was a surrender of the policy, even though it did not reach such agent until after the destruction of the property by a fire. *Id.*
3. *Return of policy after fire.*—The return of the policy by the company's agent after the fire even with knowledge of its occurrence, did not give it vitality, nor create any liability for such previous loss. *Id.*
4. *Question for jury.*—In an action on a policy of marine insurance, the evidence as to the seaworthiness of the vessel insured by defendant was held sufficient, in

this case, to entitle the plaintiff to go to the jury on the question of seaworthiness. *Osborne v. N. Y. Mut. Ins. Co.*, 568.

5. *Seaworthiness*.—Seaworthiness is a relative, not an absolute, term; and when it is held that it is a condition precedent to the taking effect of the insurance policy that the vessel is seaworthy, it is not intended that an old vessel must be understood to be equally sound as a new vessel with a higher rate. *Id.*

6. *Evidence*.—In an action on a policy of marine insurance, evidence of the prices demanded by mechanics, in the port of distress, to make the repairs necessary to enable the vessel to continue her voyage, is admissible, to justify the abandonment. *Id.*

7. *Damages*.—Advertisements for sealed proposals and the lowest bids received, are proper for this purpose, and competent for the jury to consider in connection with the other evidence. *Id.*

8. *Burden of proof*.—The burden of showing the expense of making such repairs, is on the insured. *Id.*

See BENEFIT SOCIETIES, 1, 2, 3, 4.

INTERMEDIATE ORDERS.

APPEALS, 3.

INTERPLEADER.

Where the plaintiff sold securities placed with it to secure a loan and realized from said sale more than was due on the loan, and various parties, who claimed portions of the securities brought their several actions against plaintiff for conversion, an action by plaintiff to restrain such actions against it and cause the plaintiffs therein to interplead cannot be maintained. *Fulton Bk. v. Chase*, 522.

JUDGMENT.

1. *Relief*.—The relief awarded, if within the issue joined in an ac-

tion, may exceed the demand for judgment in the complaint. *Chester v. Jumel*, 179.

2. *Vacating*.—There is no error in denying a motion to vacate the judgment, where papers which do not prejudice are improperly inserted in the judgment roll. *Id.*

3. *Confession*.—Where a judgment entered by confession contains no statement of facts from which the justice of the plaintiffs' claim can be seen, and the plaintiffs fail to furnish, on demand, evidence that the amount allowed was a just and legal obligation against the judgment debtor, a receiver representing a judgment creditor may move to vacate such judgment though entered before his appointment, and is entitled, on motion, to a reference, on which proof can be required to be given by the judgment plaintiffs or on their behalf, to establish their right as against the defendant, to the amount entered in the judgment, or to some portion of it; and if the amount has been overcharged, the judgment should be reduced accordingly. *Seligman v. Franco Am. Trading Co.*, 349.

4. *Offer of*.—An offer and acceptance of judgment before answer, have respect solely to the claims set up in the complaint. *Potter v. Gates*, 389.

NOTE ON "DEFENDANT'S OFFER TO COMPROMISE" IN ORIGINAL ACTIONS IN COURTS OF RECORD.

5. *Equity*.—The court may, in an equity action, direct the manner of enforcing the judgments, so as to secure justice among the defendants. *Varnum v. Hart*, 478.

6. *Default. Terms of opening*.—The plaintiff, who is regular in his practice in taking a default, should not be required to try the cause upon the printed case, as a condition of an immediate trial. *Hinz v. Starin*, 505.

7. *Same*.—But in such case, pecuniary terms should be imposed upon the defendant, as a condition for the favor granted him. *Id.*

JURISDICTION.

A priority of right over the subject matter is obtained by the proceedings in an action first begun in which all persons interested were made parties, and complete jurisdiction is thereby secured; and no attempt can be made in a second suit to interfere with the litigation in the former action, or to divest the court of the power to complete its hearing, and make a final disposition of the subject matter of the litigation. *Chester v. Jumel*, 185.

JURY.

APPEAL, 2.

JUSTICE'S COURT.

1. *Amendment. On appeal from justice's court.*—The pleadings, in causes which arise in justice's court, and are appealed to the county court for a new trial, should not be changed in the latter court, unless it is made very clearly to appear from the moving papers that the attainment of substantial justice requires such amendment. *Cook v. Village of Waterford*, 20.
2. *Same. When not granted.*—The party seeking the amendment in such case, is called upon to inform the county court of all the facts, which are necessary to enable that court to determine that substantial justice will be promoted by allowing such amendment, and if he fails to do so, he is not entitled to the relief sought. *Id.*
3. *Replevin.*—An action to recover a chattel may be maintained in justice's court, though the constable has made no return to the requisition of the justice of the peace. *Guyon v. Rooney*, 525.

LANDLORD AND TENANT.

1. *Lease. Covenant.*—An entry by a landlord upon the leased premises to make needful repairs, on requirement and notice of the department of buildings, is not a breach of the covenant for quiet enjoyment, though the tenant

refuses to permit the repairs. And, where due care is taken to avoid interfering with the business of the tenant, the latter cannot recover for injuries to it caused thereby. *White v. Thurber*, 119.

2. *Same.*—The refusal of the tenant to permit the repairs to be made does not affect the legal right of the landlord to make repairs rendered necessary by the insecure condition of the premises. *Id.*

NOTE ON COVENANT TO REPAIR IN A LEASE, 120.

3. *Rent.*—A receiver of a lessee is not liable for any rent or taxes which had accrued prior to his appointment, but is chargeable with all that have fallen due subsequent to his acceptance of the lease and premises. *Moore v. Higgins*, 298.

4. *Assignment.*—The lessee, where there is no provision in a lease that he will not assign without the lessor's consent, can assign his right to a new lease, for the renewal term, and such right does not, in such case, depend upon the consent of the lessor. *Phelps v. Erhardt*, 336.

5. *Receiver.*—Where the assignee is acting in the capacity of a receiver, and exceeds his duty as such, in taking the lease, it is a matter for him to settle with the court and in no ways concerns the lessor. Whether his disbursements in connection with the lease will, or will not, be allowed upon the settlement of his accounts, depends upon whether the court does or does not approve of his action. *Id.*

See NEGLIGENCE, 5.

LEGACY.

1. *Action.*—In an action to recover a legacy, an allegation of a refusal to pay such legacy, without averring a demand therefor, is sufficient. *Foulks v. Foulks*, 516.
2. Nor is it necessary, in order to recover a legacy, to allege that a year has expired since letters were

issued, where the executors are about to distribute it to other persons. *Id.*

LIBEL.

Question for the jury.—Where, in an action against a newspaper for libel, a question of fact arises on the reporter's testimony, as to his credibility, though not contradicted by the testimony of any other witness, and there is a conflict between his story and the presumption of malice which arises from the character of his act, the questions both of malice and damage are properly submitted to the jury. *Allegar v. Brooklyn Daily Eagle*, 5.

LIMITATIONS, STATUTE OF.

PARTNERSHIP, 2.

LUNATICS.

INSANE PERSONS.

MALICIOUS PROSECUTION.

Where defendant, under an arrangement, connected a system of water-pipes with a main of the Brooklyn park commissioners, and the commissioners afterwards withdrew the permission, notified the defendant and directed plaintiff to disconnect the system, for doing which he was criminally arrested by defendant, there was no probable cause for the arrest, in case the plaintiff did the work in a proper manner, so as not to cause any unnecessary injury to the defendant. *Waas v. Stephens*, 581.

MARRIED WOMEN.

HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Appliances.*—Where an employee is injured through a defect in the implements furnished him for his use, knowledge of such defect, in the employer must be shown, or proof of omission to exercise proper care to discover such defect

must be given. *Hotis v. N. Y. C. & H. R. R. Co.*, 598.

2. *Inspection.*—The duty of inspection varies according to the liability of the implement to wear out, and the risk, when impaired, to the employees. *Id.*

3. *New trial.*—Where the evidence as to the identity of the car is conflicting, and the majority of the witnesses testify that the accident occurred on a car whose brake was not defective, a verdict for plaintiff is contrary to the evidence. *Id.*

4. *Negligence.*—Where there is nothing to show that a defect in a brake was known to, or could have been discovered by, the company, before the accident occurred, the company is not liable for any injury caused to a brakeman in consequence of such defect. *Id.*

See NEGLIGENCE, 6.

MORTGAGES.

1. *Payment. Presumption.*—The inference of payment of a mortgage arising from the possession of the bond by the mortgagor or his grantee is rebutted by the absence of proof as to whom or when the payment was made or as to any satisfaction-piece, or cancellation of record, and by the want of explanation why the old back was detached from, and a new back substituted to, such bond, and why the answer was amended so as to avoid a direct allegation of payment to the mortgagee. *Anderson v. Culver*, 1.

2. *Foreclosure. Receiver.*—In an action for the foreclosure of a mortgage, where the security is ample, the court will not appoint a receiver, and thereby take the possession of the mortgaged premises from the mortgagor before a decree and sale, even though the parties have made an agreement for the appointment of a receiver prior to such time. *Degener v. Stiles*, 30.

3. *Foreclosure. Resale.*—An appli-

cation for a resale of the mortgaged premises, on foreclosure, is addressed to the discretion of the court, where no legal error is pointed out, and the sale was conducted with strict regularity. *Wollung v. Aiken*, 493.

5. *Foreclosure*.—Where the referee finds that a part of the money secured by a mortgage was delivered by the mortgagee to a creditor of the mortgagor under an alleged arrangement between the parties, the mortgagee is entitled to a judgment of foreclosure for the present debt, though such arrangement is denied by the mortgagor, *Parker v. Collins*, 571.

MUNICIPAL CORPORATIONS.

1. *Drainage*.—A village has no right to collect drainage and cast it upon private land, where it has taken no proceedings to obtain a title to do these acts upon such land. *Butler v. Village of Edgewater*, 3.
2. *Sewerage*.—It is liable for a defect in the conduit made use of in its system of sewerage. *Id.*
3. *Natural water course*.—Where the bed of a sewer was originally a natural watercourse, a village cannot destroy it by collecting impure drainage and casting the same into it. *Id.*
4. *Assessments*.—A preliminary resolution of the common council of the city of Buffalo, declaring that the proceedings are for the purpose of extending a certain street, and giving the lines of such extension to the termini of such line, is a sufficient compliance with the requirements of the charter of the city of Buffalo. *Broezel v. City of Buffalo*, 375.
5. Where the notice of application for the appointment of commissioners states that such application will be made for their appointment, "to appraise such lands and property," it is also a sufficient compliance. *Id.*
6. *Proceedings, when not void*.—The proceeding, in an action

brought by property owners, will not be vacated on the ground of irregularity, where there was no change in the description of the lands assessed to any of them. *Id.*

7. *Ordinances*.—An ordinance prohibiting the sale of merchandise at auction in a village without a license, is general, and applies to all persons alike, selling at auction at any place within the village, except, perhaps, at judicial sales, and public sales of second-hand furniture. *Village of Port Jervis v. Close*, 501.
8. *Power*.—Selling at auction is properly within the power of the state to regulate. *Id.*
9. *Defense*.—It is no defense, in a proceeding to recover for a violation of this ordinance, that others, who have violated it, have not been prosecuted therefor. *Id.*
10. *Salary*.—The amendment of chap. 447 of Laws of 1875 to chap. 69 of Laws of 1868, relating to the salary of the receiver of the town of Greenburgh, etc., still leaves such receiver a salaried officer, and he is not entitled to the two per cent. on taxes returned unpaid, allowed by chap. 193, Laws of 1877, to receivers who are not paid by salary. The percentage on sums paid to, and collected by, him goes to make up the salary. *People v. Besson*, 576.

NEGLIGENCE.

1. *Question of fact*.—Where the evidence is conflicting, in an action for injuries on the ground of negligence, as to the cause of the accident, it is for the jury to decide which of the conflicting theories is best recommended by the evidence to their judgment. *Saffer v. D. D., E. B., etc., R. R. Co.*, 343.
2. *Contributory*.—The plaintiff is guilty of contributory negligence, if he does anything in the way of getting off the car, which helps, or contributes, to bring about the injury. *Id.*
3. *Right of passenger*.—Passengers

are not obliged to leave a car until it has been brought to a stand, and have a right to insist upon this privilege, and thus guard and protect themselves against a class of accidents which result from endeavoring to leave the car while it is in motion. *Id.*

4. *Liability*.—An agreement requiring the defendant to enter upon plaintiff's land for the purpose of filling in, grading and making an embankment thereon so as to confine the defendant's pond and prevent it from overflowing plaintiff's land, and for this purpose to use her old retaining wall along the creek, as a condition to her consent to his raising his dam, is no excuse for the construction of the dam beyond its former height, in the absence of his performance of such precautionary measures, and is no defense to an action for negligence in raising the dam, whereby plaintiff's land was overflowed; and a refusal to admit such agreement in evidence on the trial of the action, when offered by defendant, is no ground for the reversal of a judgment in favor of plaintiff. *Penfield v. N. Y. & M. V. Water Co.*, 495.

5. *Landlord and tenant*.—Where a landlord, who furnished steam for heating purposes and to operate machinery in his building, as soon as he discovered a defect in the boiler, employed a workman to remedy the defect, he is not liable to the lessee of rooms in the building for injuries to his property resulting from an explosion of the boiler while in the hands of the mechanic, even though it was occasioned by the latter's negligence in repairing the defect. *Perkins v. Eighmie*, 497.

6. *Master and servant*.—The relation of master and servant does not exist between the landlord and the mechanic employed to repair the boiler. *Id.*

7. *Rapid driving*.—It is negligence to drive a wagon rapidly, when the wagon is so constructed that the driver can only see an object some twenty feet or more in front of the horses' heads. *Oelertich v. N. Y. Con. M. Co.*, 563.

8. *Intoxication*.—Injury by reason of the habit of strong drink, or a single instance of indulgence, is imputed to the master, while the servant is engaged in his business. *Id.*

9. *Child*.—The question of contributory negligence, in a case of a child, is one for the jury, where its tender age is to be considered with reference to the degree of prudence and caution required of him under the circumstances. *Id.*

10. *Highway*.—A person is guilty of contributory negligence, if he does not stop when he finds his wagon off the travelled road on an incline. *Ham v. L. & S. Turnpike Co.*, 593.

- 11.—The turnpike company is under no obligation to extend wings across the untravelled part of its road. *Id.*

See EVIDENCE, 25.

MASTER AND SERVANT, 4.
QUESTION OF FACT, 2.

NEW TRIAL.

1. *Newly discovered evidence*.—Newly discovered evidence, which will not affect the result of the first trial, does not furnish ground for the granting of a new trial. *Gallup v. Henderson*, 521.

2. *Excessive damages*.—A verdict is excessive, where damages are given in part for injuries not caused by the accident. *Hanson v. Atkman*, 528.

See MASTER AND SERVANT, 3.
WILLS, 4, 5, 6.

NONSUIT.

APPEAL, 4.

OFFER OF JUDGMENT.

CORPORATIONS, 4, 5.
JUDGMENT, 4.

OUSTER.

PARTITION, 4.

PARTIES.

1. *Equities. Conflicting.*—All the parties interested in a fund, where conflicting equities are required to be settled before its distribution can be made, must be brought before the courts, before a sale of the property, or distribution of its proceeds, will be directed by the judgment. *Chester v. Jumel*, 159.
2. *Parties.*—The joining of an unnecessary party, in an equity action, does not render the complaint invalid. *Foulks v. Foulks*, 516.

PARTITION.

1. A depository of funds is justified in paying them in accordance with the original judgment in the action, where neither it, nor its officers, have been served with an order amending the interlocutory judgment in regard to the disposition of such funds. *Foster v. Roche*, 197.
2. When the purchaser completes his bid by paying to the referee the amount thereof, he discharges his whole duty in the matter. *Id.*
3. The party who consents, before an amendment to the judgment in regard to the disposition of the fund is known to the depository, that the moneys may be drawn out under the original judgment, cannot be heard to complain. *Id.*
4. *Ouster.*—The exclusive possession for more than twenty years by one co-tenant under a claim of absolute ownership, the hiring of the premises to the other co-tenant, and demand from him of the entire rent, constitute an ouster such as will bar the latter from maintaining an action for partition. *Gedney v. Ball*, 511.
5. A deed from an interested person, not a party, to a party in a partition suit, after the rendition of the decree therein, will not pass such interest to the purchaser at the partition sale. *Bogert v. Bogert*, 22.

PARTNERSHIP.

1. *Guaranty.*—A partner who gives

to his firm an instrument in writing, indemnifying them against all loss or damage by reason of certain advances made by them on his individual liabilities, and afterwards transfers his interest in the firm, though without reservation or recourse, is not thereby released from his contract of guaranty. *Sibley v. Starkweather*, 472.

2. *Statute of limitations.*—A judgment against the firm on its undertaking, determines its liability; a cause of action then accrues in favor of the firm on the contract of indemnity, and the statute of limitations begins to run in favor of the partner from the date of the said judgment, though such judgment has never been paid. *Id.*

PAYMENT.

Where, in an action to recover state bounty money, for substitutes furnished, under the call of December, 1864, received by defendant for the use of plaintiff's assignors, in which the defense was payment, there was nothing in the evidence to indicate how many of the substitutes furnished by plaintiff's assignors were procured, or how many of them were of the number to whom nothing was paid, or to whom a larger or smaller sum was paid, out of the county funds, the defense of payment was not established. *Tabor v. Supervisors, etc.*, 459.

See ASSIGNMENT, 2.
MORTGAGES, 1.
PLEADINGS, 7.
PRINCIPAL AND AGENT, 1.

PLACE OF TRIAL.

1. Where, on a motion to change the place of trial, it appeared that the plaintiff's agent who took the notes, and his employees who heard the contract at the time of the execution of the notes, live, and the goods for which the notes were given were to be delivered, in the proposed county, the issues will be more properly tried in, and the trial of the action is properly changed to, that county. *Tutthill v. Felter*, 577.

2. *Affidavit*.—An affidavit of defendant in which the facts, to which the witnesses are expected to testify, are set out in full, is unobjectionable. *Id.*

PLEADINGS.

1. *More definite and certain*.—By rule 22 of the general rules of practice, a motion to make a complaint more definite and certain is required to be made before the service of a demurrer or an answer. *De Carrillo v. Carrillo*, 11.
2. *Supplemental answer*.—A motion for leave to interpose a supplemental answer in an action brought by an assignee to recover the possession of certain shares of stock, setting up, in bar of the present action a judgment rendered in an action brought by the assignor against the same defendant to recover shares of the same stock, is properly denied, where the transfer was made prior to the commencement of the assignor's action. *Borrowcliffe v. Cummins*, 59.
3. *Defenses*.—It is the duty of a defendant in an action, whether he has a legal or equitable defense, to set up both or either of them in the first action commenced, relating to the subject-matter. He cannot reserve an equitable defense, and then file a bill to restrain another, either legal or equitable, action. *Richardson v. Davidson*, 194.
4. *Same*.—When the defendant has answered in the first action without setting up his equitable defense, it is immaterial whether or not full relief can be granted to him under such answer. It was his own fault that he did not avail himself of such opportunity, and he cannot be allowed to intervene subsequently and enjoin the trial of that action, in order that his defense may be tried in a separate suit. *Id.*
5. *Same*.—It is too late for a defendant, after he has allowed a number of suits to be ready for trial, to file a bill to establish his defenses to those actions on the

ground of preventing a multiplicity of actions. *Id.*

6. *Answer*.—Where plaintiff unnecessarily alleges matter, the negative of which will constitute an affirmative defense, the defendant need not, in addition to a general denial, plead affirmatively the fact, to enable him to give evidence thereof. *Bryant v. Town of Randolph*, 381.
7. *Payment*.—A mere denial of the complaint does not permit proof of payment. *Potter v. Gates*, 389.
8. *Failure to plead counterclaim*.—An omission to set up, in a former action, a counterclaim arising on an independent cause of action, does not preclude, nor is such former action a bar to, a subsequent suit thereon. *Id.*

See Costs, 2.

POLICE JUSTICE.

1. *Jurisdiction*.—The power of the mayor of Buffalo to remove a police justice for misconduct does not deprive the supreme court of like jurisdiction. *Matter of King*, 356.
2. *Charge. Specification*.—In proceedings for the removal of a police justice, a specification cannot extend over a period of time which the charge itself does not cover; and conduct prior to the time specified in the charges cannot be made the subject-matter of removal thereunder. *Id.*
3. It is not sufficient cause for his removal that, from passion and prejudice, he adjourned a bastardy case for some time and kept the defendant in jail in the meantime, where no objection was made to the adjournment and extenuating circumstances appear. *Id.*
4. Nor is the malicious utterance of slanderous language from the bench regarding the mayor, and the county judge, a sufficient cause of removal; nor the suspension of sentence on a prisoner convicted of assault and battery. *Id.*
5. Objection to the appointment of

policemen for his court and to their attendance does not constitute serious misconduct. *Id.*

6. Nor does his statement in a return to an appellate court, that the attorney taking the appeal was a "penitentiary outcast and legal pirate," being true, constitute an offense. *Id.*

7. It is only such a violation of duty as directly tends to prejudice the maintenance of public justice, or a reckless exercise of functions accompanied by an indifference to considerations of right and wrong, which present sufficient cause for removal. Mere reckless private speech and defamation of character, which have no connection with the discharge of his judicial functions, and do not affect, in the least, the administration of his office, do not constitute sufficient ground. *Id.*

POOR AND POOR LAWS.

1. In order to sustain an action brought under the provisions of sections 59, 61, title 1, chapter 20, part 1, R. S., the statute requires that the person removed or removing must be a pauper at the time of his removal to the county in whose behalf the proceeding is taken. *Bellows v. Courter*, 367.
2. *Notice. Liability.*—A notice, given by the superintendent of the poor to the overseer which simply states that the pauper was supported at the expense of his county, without an averment of an unlawful or improper removal, is insufficient, under section 59, title 1, chap. 20, part 1, of the Revised Statutes, as amended by chap. 546, Laws of 1885, to require the overseer to deny by counter notice, does not preclude the town, in the absence of such denial, from contesting the claim, and does not comply with the requirements of the statute so as to create any liability against the defendant. *McKay v. Welsh*, 463.

PRINCIPAL AND AGENT.

1. *Payment.*—A debtor does not pay

his debt by furnishing the money to his agent for the purpose of paying it, if the money never comes into the hands of the creditor; and the latter is not to be a loser by a diversion of the fund. *Smith v. Smith*, 373.

2. *Authority.*—A person who is permitted by a firm to represent it by hiring, paying and discharging an employee, may be regarded by the latter as the agent of the firm. *Coz v. Albany Brewing Co.*, 590.

PROMISE.

CONTRACT, 1, 2, 3.

QUESTION OF FACT.

1. It is for the jury, and not for the court, where the undisputed evidence supports two inferences, to say which inference ought to be drawn from the facts, even though the facts are undisputed. *Citroen v. Adam*, 187.
2. *Contributory negligence.*—The question of contributory negligence is for the jury, where the evidence shows that the accident occurred while the deceased was driving with a heavy load down a steep descent, and the testimony is conflicting as to whether his wagon had a brake, and whether he was in a position to use it. *Bryant v. Town of Randolph*, 381.
3. *Highway.*—That the defective highway was on land belonging to a railroad company, is a matter for the consideration of the jury. *Id.*
4. *Same.*—The fact that the roadway had remained as constructed for more than 27 years, was not a defense necessarily, but was a circumstance which the jury should have been allowed to take into consideration in determining the question, whether the highway commissioner was, at the time, personally chargeable with negligence for which the town must respond. *Id.*
5. *Easement.*—Where defendant had contracted with the city of Yonkers to construct a sewer upon

land owned by plaintiff, who had granted an easement therein to the city for such purpose, and the right of temporarily using the adjoining dock surface for the deposit of materials during its construction, the reasonableness of defendant's act, as the instrument of the city in using this dock surface for deposit of materials, is a question for the jury, if there is a conflict of evidence. *Ludlow v. Gierhon*, 537.

See DAMAGES, 2.
INSURANCE, 4.
NEGLIGENCE, 1.
REFEREE, 2.
SERVICES, 3.
WILLS, 20.
WITNESSES, 2, 8.

RAILROADS.

Duty.—A railroad company which locates its road upon the public highway, is legally bound, not only to construct the same in such manner as to render it reasonably safe for the travelling public, but also to maintain it in that condition. *Currier v. O. & L. C. R. R. Co.*, 12.

See NEGLIGENCE, 3.

REARGUMENT.

APPEAL, 30, 31, 32.

RECEIVER.

LANDLORD AND TENANT, 3, 5.

REFEREE.

1. *Case. Certificate*.—A referee is warranted in refusing to insert in a case a certificate that a brief abstract contains all the evidence given in support of the findings of fact to which exceptions are taken, where a large mass of testimony was taken on the trial. *Abbott v. Thomas*, 7.
2. *Question of fact*.—Where a fair question of fact, upon conflicting evidence, is presented for the consideration of a referee, and his finding of fact is not contrary to

the weight of the evidence, the general term will accept his finding of fact. *Deach v. Perry*, 99.

See APPEAL, 9.
TRIAL, 4.
WITNESSES, 3, 4.

REFERENCE.

Compulsory.—An action for conversion is not referable by compulsion, and an answer setting up a defense, involving the examination of a long account, does not make it so. *Fiero v. Paulding*, 515.

REPLEVIN.

JUSTICE'S COURT, 3.

REQUEST TO CHARGE.

APPEAL, 29.

RIGHT OF WAY.

INJUNCTION, 1.

SALE.

1. *Memorandum*.—Without a consideration to support the contract, a memorandum of sale of personal property is invalid. *Van Gordon v. Sackett*, 582.
2. *Evidence*.—Parol evidence as to the time and manner of payment is not necessarily inconsistent with a memorandum, which contains no provision upon this subject. *Id.*
3. Where, under a contract to deliver a certain amount of produce it was understood that the vendor, who was only a tenant in common therein, should draw what he had and receive pay therefor, without reference to the fact whether his co-tenant drew his share, the purchaser, after receiving and retaining the vendor's share, is not in a position to assert the entirety of the contract, but is bound to pay for the amount delivered, and may resort to his claim for damages for the non-delivery of the balance. *Id.*

SAVINGS BANKS.

Where a savings bank contracts to make no payment, unless the depositor calls for the same in person, or by attorney duly constituted, it is liable for all moneys paid to third persons out of such deposit, without such authority, though the contract contains a subsequent provision that the bank shall not be held liable for any fraud committed by producing a bank book. *Kummel v. Germania S. Bk.*, 531.

SECURITY FOR COSTS.

COSTS 5.

SERVICE OF SUMMONS.

CORPORATION, 7, 8.

SERVICES.

1. *Gratuitous*.—There is nothing to call for a conclusion that services are done gratuitously, where the parties, though related do not form one family. *Simonson v. Simonson*, 559.
2. A person, who is in the employment of an estate, may, during the time he is so employed, render services, for the executor personally, in case the estate does not suffer in consequence, and may recover for the work so performed. *Id.*
3. *Question of fact*.—The omission by the employee to present a claim for such services, until he has left the employment of the executor, is not sufficient to bar a judgment therefor; at most it is a question for the jury. *Id.*

SPECIFIC PERFORMANCE.

In actions for the specific performance of a contract to exchange real estate, it is discretionary with the court to grant such relief; and where, for any reason, the enforcement will be against conscience and justice, it will be refused. *Lennon v. Stiles*, 145.

See INFANTS, 2.

STOCKHOLDER.

ABATEMENT AND REVIVAL, 1.

STATUTE OF FRAUDS.

CONTRACTS, 6.

STAY OF PROCEEDINGS.

APPEAL, 11.

SUPPLEMENTAL ANSWER.

PLEADINGS, 2.

SURROGATE.

1. *Power*.—A surrogate has power to vacate orders which his court had no power to make. *Matter of Underhill*, 541.
2. But he has no power upon the accounting beyond settling the accounts; he cannot order a legatee to repay to the executor an over-payment of legacy. *Id.*

See APPEALS, 17, 18.
EXECUTORS, 2.

TAXES.

Where an owner of a portion of the property abutting upon an alleyway pays a part of the amount of the assessment levied upon said alley, which payment is credited generally on the whole assessment without apportionment, the unpaid balance of the tax remains a lien upon the whole of the alleyway. *Rosenberg v. Freeman*, 189.

TOWN.

Liability.—It seems that a town when defendant and liable for the negligence of the highway commissioner, will not be permitted to show, as a defense, a lack of funds for making repairs, or inability to raise them. *Bryant v. Town of Randolph*, 381.

TRIAL.

1. *Charge*.—A refusal to charge the jury that, "if the gun was not loaded at the time he pointed it at Decker, no crime was committed,

and the defendant must be acquitted," was not error. *People v. Morehouse*, 241.

2. *Charge*.—Where the requests to charge are improper and incorrect, the court may properly refuse to give the direction sought. *Moore v. Higgins*, 298.
3. *Objections*.—The court may permit a witness to answer a question against objection where the response may be competent, unless the offerer's statement on request as to its nature, shows its incompetency. *Varnum v. Hart*, 478.
4. *Referee*.—A referee must disregard testimony discredited by numerous contradictions and improbabilities. *Tooker v. Ackerty*, 507.
5. *Defenses*.—In an action for an accounting for money entrusted by plaintiff to defendant for investment, a release, executed by plaintiff, to be delivered to defendant on return of certain letters, but obtained by pretending to give them up, without doing so, is no defense. *Id.*
6. *Charge*.—A refusal to charge that there is no evidence to justify any allowance for future damages, or for permanent disability, is not error, where there is testimony that plaintiff cannot recover from his injuries. *Johnson v. B. & S. Ave. R. R. Co.*, 532.
7. *Juror*.—Where a juror states that, notwithstanding his sympathies, he can render an impartial verdict upon the evidence, he stands upon the extreme verge of competency. *McKinney v. Long Island R. R. Co.*, 543.

UNDERTAKING.

ATTACHMENT, 13.

VERDICT.

1. *Excessive*.—A verdict, which, though quite large, does not shock the average sense of justice, in view of inferences which might be, and doubtless were, drawn by

the jury, is not excessive. *Alliger v. Brooklyn Daily Eagle*, 5.

2. *When not set aside*.—The circumstance that the appellant's witnesses on a certain point outnumbered the witnesses of the respondent on the same point, does not furnish an occasion for disturbing the verdict. *Cleveland v. N. Y. Steamboat Co.*, 93.

See APPEALS, 1.

WATERCOURSE.

MUNICIPAL CORPORATIONS, 3.

WILL.

1. *Construction. Jurisdiction*.—In a former action for the construction of a will, a final judgment was entered, defining the rights of the parties, and granting leave to any party at any time thereafter to apply to the court for further or other relief, as circumstances may require. The petition in this matter alleged that some of the beneficiaries, under the will, had since died without issue, and that a further construction of the will was necessary to determine the rights of the parties. Some of the defendants appeared and filed answers to the petition admitting the facts therein contained, but there was no proof of service upon, nor appearance by, the executor of the testator. Without taking any proofs of the facts alleged in the petition, the court proceeded to construe the will as though such facts had been established. It was held that the court acquired no jurisdiction, as all the necessary parties were not before it, and the facts necessary to be established had not been proved; that it was not sufficient that the parties who appeared, admitted them. *Duclos v. Benner*, 31.
2. *Application at foot of decree*.—Under a general reservation of leave, at the foot of the decree, to apply for further relief, it seems to be extremely doubtful that the court would have the power to try new issues. *Id.*

3. *Execution*.—Writing the name only at the commencement of a will, instead of signing it at its conclusion, is, at the most, uncertain and equivocal. In order to render it a sufficient signing, under the statutes of New Jersey, the decedent must make some reference to the name, as intended as her signature. There must be some proof on the part of the proponent that the name written in the instrument in this manner was so written for, and intended as, the signature of the decedent. *Matter of Booth*, 213.
4. *New Trial*.—The court, where issues of fact on a probate proceeding have been framed and tried at the circuit, may entertain a motion for a new trial upon its minutes, or at a special term. *Id.*
5. *Motion for judgment*.—A motion at general term upon the verdict in such case, is premature during the pendency of an appeal from an order denying such new trial. *Id.*
6. *General issues*.—Where, on the probate of a will, several issues are framed and submitted to the jury, and their finding on one issue shows that they are prepared to find a verdict unsupported by evidence, a new trial should also be granted as to all the other issues submitted at the same time, though, as to those issues, the verdict is not contrary to the evidence. *Id.*
7. A will, wherein the testator gives to his wife all his property in preference to his brothers or sisters, is not an unnatural one, especially where he was mainly indebted to her bounty for his property.—*Matter of Libby*, 223.
8. *Reversal of probate*.—Grave doubts should remain unremoved and great difficulties oppose themselves to the upholding of the decree admitting a will to probate before a reversal should be made by the general term. *Id.*
9. *Evidence. Burden of proof*.—The burden of proof that a testator is *non compos mentis* rests upon the party who alleges it. *Id.*
10. *Proof of execution*.—Though the subscribing witnesses to a will do not agree to all the details attending the prominent features of the execution, are not entirely in harmony as to the manner in which the execution of the will took place, and manifested some interest in getting the will executed, yet, if all testified to necessary circumstances from which due execution must necessarily be found, the general term will not reverse the surrogate's decree admitting the will to probate, so as to refer the question to a jury. *Id.*
11. *Undue influence*.—The mere fact that a wife has exercised influence upon her husband in relation to the disposition of his property, by will or otherwise, in no way supports the proposition that fraud, undue influence or duress has been employed. *Id.*
12. *Fraud*.—Nor is the fact that a stranger was sent for, in order to draw the will, a badge of fraud, though one of the testator's brothers, who was in the house at the time, was a lawyer and able to perform the professional duties necessary for the execution of the will. *Id.*
13. *Subscribing witness*.—A subscribing witness may speak of the sanity and condition of the testator at the time of executing the will, and that he was not under restraint. *Id.*
14. *Medical testimony*.—The testimony of a medical witness in response to hypothetical questions, not justified by the evidence, is not entitled to any consideration. *Id.*
15. *Testamentary capacity*.—The finding of the jury as to the testator's incapacity, upon conflicting evidence, on the issue of his capacity, will be sustained. *Petrie v. Petrie*, 438.
16. Though the testimony of the attorney, who drew the will, tends to show that the testator knew what he was about, and comprehended the character of the instrument he was making, and the

- acts and conversation of the deceased impressed the subscribing witnesses as rational, it cannot be said, as matter of law, that this part of the evidence is controlling, but it must all be taken together. *Id.*
17. *Undue influence.*—If the testator was not competent to make the will, it is immaterial whether or not there was undue influence. *Id.*
18. *Appeal.*—The general term, on reversing a decree admitting a will to probate, must enter an order requiring the submission of the questions of fact to the jury. *Matter of Jaycott*, 545.
19. In such case, the questions of law are for the court, and the questions of fact ought to be submitted to the jury. *Id.*
20. *Questions of fact.*—Where issues of fact have been settled by an order of the general term, on reversing a decree of the surrogate admitting a will to probate, in reference to the execution of the will, testamentary capacity and undue influence, the case, where the evidence is conflicting on these points, involves questions of fact for the jury. *Id.*
21. *Void.*—Where the testator is ignorant of the effect of a clause in his will, designed and contrived to save a legacy in case of his death within the time which would invalidate the legacy, the instrument is not an expression of his will. *Id.*
22. *Charitable bequest.*—And the fact that the will was read over, clause by clause, to the testator, does not affect a determination on a former appeal, that he was ignorant that a charitable bequest therein contained would become void in case of his death within two months. *Id.*
23. *Evidence. Hypothetical.*—Professional witnesses, on hypothetical questions, are permitted to testify to their opinions as to the mental condition of the testator, and his capacity to concentrate his thoughts on matters of business, to resist importunity, and generally to overcome influence. *Id.*
24. *Same. Declaration of trust.*—A declaration of trust, made long subsequently to the will, is incompetent. *Id.*
25. *Power of disposition.*—A gift of property, by will, to the wife, with absolute power to dispose of or charge it with debts, is not repugnant to a subsequent provision giving the undisposed, or unexhausted, amount to residuary legatees. *McKeown v. Officer*, 552.
26. *Life estate.*—The use of the words, "I devise all my real estate," etc., in a will, is not necessarily incompatible with an intent to give a life estate, with power to consume the whole, or absorb it by contracting debts. *Id.*
27. *Fee.*—The fact that the gift is absolute for purposes of enjoyment, with power of disposition for that object, does not enlarge the estate into a fee. *Id.*
28. *Charitable institutions.*—A bequest of the residue of an estate, after a life estate to the testator's wife is given with absolute power of enjoyment and disposition, to charitable institutions, is contrary to the provisions of the statute of 1860, and valid only to the extent of one-half of such residue. *Id.*
29. *Statute of 1860.*—The prohibition of the statute is peremptory and operates upon the capacity of the testator to make a will which offends the statute; and any heir at law, who would be entitled to share in his estate, in case of the entire or partial invalidity of a will, because its provisions are violative of the statute, may insist upon such restriction, though not one of the relatives designated in the statute. *Id.*

WITNESSES.

1. *Credibility.*—The fact that some contradictions are found in the testimony of the plaintiff as a witness on the present trial, when

compared with his testimony on the former trial, would not have warranted the trial court in ruling, as a matter of law, that he was not entitled to credit; but the question was properly confided to the jury, with proper instructions, for them to determine, from all the circumstances before them, upon the evidence tending to corroborate the plaintiff, whether or no the position taken by him on the trial was in accordance with the truth. *Cleveland v. N. J. Steamboat Co.*, 93.

2. *Credibility. When question for the jury.*—Where witnesses, who are called on behalf of a party, are in his employ, and more or less interested in the question involved, what credence shall be given to them is a question for the jury to determine. *Id.*
3. *Credibility.*—A referee may believe the portion of the testimony of a witness which he deems to be worthy of confidence, and reject the residue. *Chester v. Jumel*, 182.
4. He may discredit the testimony of parties and interested witnesses. *Id.*
5. *Attorney.*—Where the privilege has been waived, the testimony of counsel in the action is competent. *Masterton v. Boyce*, 205.
6. *Previous statements.*—The declaration of a witness, made before

or after trial, is competent to impeach his testimony. *Id.*

7. *Credibility.*—A general assignment for the benefit of creditors will not be declared fraudulent on the unsupported testimony of the assignors, where it is contradicted by the testimony of several unimpeached witnesses. *Nordlinger v. Anderson*, 334.
8. *Questions of fact. Credibility.*—The credit to be given to evidence of interested witnesses is a question for the jury. *Mackee v. Webb*, 421.
9. *Section 829.*—An interested witness may testify to a conversation between decedent and another person, though mentioned in it, if he took no part therein. *Petrie v. Petrie*, 438.
10. A witness, after having detailed transactions with, or concerning, the deceased, may be allowed to state whether such transactions, as detailed by him, impressed him at the time as rational or irrational. *Id.*
11. *Subscribing.*—A subscribing witness cannot be asked directly or in effect to compare what he has not described with what he may have seen on previous occasions. If the party asking the question desires the benefit of the exceptional rule applicable to subscribing witnesses, the form of the question should distinctly indicate the fact. *Id.*

HARVARD



